93-281

No. _____

In The

Supreme Court of the United States

October Term, 1993

DERRICK DALE FONTROY,

Petitioner,

v.

DAVID S. OWENS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Third Circuit's decision contrary to *Helling v. McKinney*, ___ U.S. ___, 61 U.S.L.W. 4648 (June 18, 1993) (on tobacco smoke), and to holdings of the Fourth and Eleventh Circuits in its decision that an inmate's involuntary exposure to asbestos does not raise an Eighth Amendment claim, even absent present injury; and is the asbestos exposure issue not the subject of further conflict among the circuits?

2. In dismissing, for failure to state a claim, a non-frivolous Fourteenth Amendment Equal Protection issue of irrational discrimination against inmates in Protective Custody, is the Third Circuit in error and in conflict with decisions of the First, Fifth, Seventh, and Eighth circuits?

3. Does the decision of the Third Circuit, affirming the District Court's *sua sponte* dismissal of a claim of inadequate prison security, which had twice been found to state a claim, conflict with this Court's decisions and with decisions of courts of appeals regarding either the "law of the case" doctrine which precludes such dismissal, or the requirement for pre-dismissal adequate notice?

LIST OF ALL PARTIES

The Petitioner is Derrick Dale Fontroy, who was the named plaintiff and appellant below.

The Respondents are:

David S. Owens, Jr.,
Superintendent of Philadelphia County Prison System

Irene Pernsley,
Commissioner of Philadelphia Department of Human Services

Gaetano Curione,
Warden of Holmesburg Prison

Harry Moore,
Deputy Warden of Holmesburg Prison.

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PETITION FOR WRIT OF CERTIORARI

Derrick Dale Fontroy respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered on February 25, 1993 which affirmed the Judgment of United States District Court of Eastern District of Pennsylvania entered on May 1, 1991, the interlocutory orders merged therein, and the subsequent reinstatement of the judgment of November 20, 1991.

OPINIONS BELOW

The decision by the United States Court of Appeals for the Third Circuit entered February 25, 1993 has not been reported, except in the table at 989 F.2d 486 (1993). It is reprinted in the appendix hereto, App., Ex. 14, A. 148.

The order of the United States District Court for the Eastern District of Pennsylvania (O'Neill, D.J.) entered November 20, 1991 has not been reported. It is reprinted in the appendix hereto, App., Ex. 12, A. 144.

The order of the District Court entered August 19, 1991 has not been reported. It is reprinted in the appendix hereto, App., Ex. 11, A. 141.

The order of the District Court entered May 1, 1991 has not been reported. It is reprinted in the appendix hereto, App., Ex. 10, A. 133.

The order of the District Court entered April 21, 1988 has not been reported. It is reprinted in the appendix hereto, App., Ex. 6, A. 62.

The order of the District Court entered April 28, 1987 is not reported officially but is reported at 1987 WL 10111 (E.D. Pa.). It is reprinted in the appendix hereto, App., Ex. 3, A. 43.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1343, the Plaintiff brought this civil rights suit in the United States District Court for the Eastern District of Pennsylvania. On Plaintiff's appeal, the Third Circuit on February 25, 1993 entered a judgment affirming the District Court's orders. No petition for rehearing was sought.

On June 11, 1993, Justice Souter ordered that the time for filing this petition for writ of certiorari be extended to and including August 26, 1993. This case raises Eighth and Fourteenth Amendment claims on prison conditions. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § I:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Plaintiff, Derrick Dale Fontroy, filed a *pro se* Complaint under 42 U.S.C. § 1983 against David Owens, Superintendent of the Philadelphia Prison system, on April 28, 1987.[1] The Plaintiff was an inmate in Protective Custody at Holmesburg Prison when he filed his original papers on August 12, 1986; he was transferred out of Holmesburg on September 6, 1986.[2]

The *pro se* Complaint raised three issues relevant here: involuntary exposure to asbestos, inadequate prison security, and denial of equal access to prison activities.[3] App., Ex. 2, A. 25-37.[4] With regard to the third issue, the special deprivations accompanying confinement in the Protective Custody

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[1] The Plaintiff filed an *in forma pauperis* petition, with the proposed complaint, on August 12, 1986. The I.F.P. was granted on April 28, 1987. Thus, the docket shows that the Complaint was filed April 28, 1987.

[2] Fontroy is serving a life sentence for the brutal homicide of the two year old son of his girlfriend. The Defendants, in their argument in the court below, sought to utilize the tragic circumstances of the crime (which are not part of the record in this case) to undermine the entirely independent legal issues which were presented below and are raised here.

[3] Citations to all exhibits found in the Appendix are identified as "App., Ex. ___".

[4] A "Stipulation" is attached to the Complaint. The Stipulation is a statement signed by forty-seven Protective Custody inmates. It is not a stipulation in the legal sense of an agreement with other parties in the

Unit of Holmesburg (known as "D/Rear"), the *pro se* Complaint protested the violation of Eighth Amendment Federal constitutional rights with regard to equal access to paid employment, telephone and television service, education, law and reading libraries, religious services, tobacco products and the stipulations agreed in *Jackson v. Hendrick*, ___ Pa. ___, 503 A.2d 400 (1986).[5] App., Ex. 2, A. 25-37. The difference in treatment accorded to D/Rear inmates was alleged to constitute "discrimination" which violated the Fourteenth Amendment's Equal Protection Clause.[6]

The *pro se* Complaint explained that "Protective Custody" by definition involves separation from other prisoners "either because our lives are in danger or because we are physically unable to function in population, i.e., BROKEN LEGS, SEIZURES, etc., (not including mental disorders)." App, Ex. 2, A. 27. However, in practice, inmates are placed in D/Rear "merely because there is no room in the rest of the

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litigation. The facts in the stipulation are incorporated into the complaint by reference. App., Ex-2, A. 21.

Although the original complaint is not titled a "class action," it seems to have been intended to be a class action. In his original complaint, the plaintiff's name is followed by the words "et al" and the relief is requested on behalf of all inmates in D/Rear. The words "on behalf of themselves and all other similarly situated" are on the caption of the November 6, 1987 motion "amended the caption" to add five individual inmates named as "plaintiffs." As the case comes to this Court, however, it is an individual action by Plaintiff Fontroy who later filed a Second Amended Complaint in his own name.

[5] *Jackson* is a systemic class action concerning conditions in the Philadelphia prison system. *Id.* Fontroy alleges that Defendant Owens is in violation of the order in *Jackson* governing commissary pricing, food service and bug extermination.

[6] "Equal Protection" was not specifically identified in the body of the three page *pro se* Complaint but the explicit reference to *Nadeau v. Helgemoe*, 561 F.2d 411 (1st Cir. 1977) is reasonably read to allege a violation of that constitutional right. In any event, an Equal Protection claim was specifically made in the promptly filed Amended Complaint. App., Ex. 4, A. 21.

jail" or as a way station for inmates moving from disciplinary confinement back to general population. App., Ex. 2, A. 27. As a result, Fontroy has been victimized on numerous occasions A. 29 (theft, extortion).

On April 28, 1987, the District Court dismissed a number of the Equal Protection claims as frivolous, namely, the claims relating to employment, telephone and television service, education, libraries, tobacco products and *Jackson v. Hendrick* issues. App., Ex. 3, A. 43. Because there was no constitutional right involved in any of those claims when considered individually, the District Court dismissed the claims as frivolous. App., Ex. 3, A. 43. The District Court, however, discussed these claims in isolation without mentioning the claim of discrimination between the D/Rear and D/Front inmates. The District Court failed to consider the differences between what the general prison population received and what inmates in Protective Custody received.

In the same orders, the District Court allowed the action to proceed regarding the exposure to asbestos claim and the claim of inadequate security. App., Ex. 3, A. 43-44. Also, the District Court allowed the two remaining Equal Protection claims, access to the courts and religious services, to proceed. App., Ex. 3, A. 43-44.

Defendant Owens filed a Rule 12(b)(6) motion to dismiss on June 2, 1987 claiming that, because *respondeat superior* is unavailable in a § 1983 action, and because no affirmative link was alleged between Owens and the allegations, the Plaintiff had failed to state a claim. Motion to dismiss at ¶ 8. He also claimed that the complaint contained only "vague and conclusory allegations" which "fail to reach the required specificity to state a claim upon which relief can be granted." *Id.* at ¶ 7.

On June 9, 1987, Plaintiff filed an Amended Complaint alleging violation of the First, Fifth, Eighth and Fourteenth Amendments, specifically alleging irrational and baseless discrimination against Protective Custody inmates in violation of the Equal

Protection Clause.[7] App., Ex. 4, A. 51. The Plaintiff's five areas of concern are summarized as follows:

> 1. Jobs. Recognizing that there will not necessarily be jobs for all who want them, it is alleged that Protective Custody inmates are not paid for their work, while general population inmates are paid for their work.
>
> 2. Telephone and Television. With more inmate room on Protective Custody Units than in the General Population, Protective Custody inmates are given one television, and General Population inmates have two. Protective Custody inmates share one direct phone line and two collect phones, compared to two direct and three collect lines for the General Population inmates.[8]
>
> 3. Education. Educational programs are denied in violation of the Equal Protection Clause "just because we are in protective custody" although "education could be a tool to some of us to get out, and stay out of jail." App., Ex. 4, A. 54. Three programs are denied to PCU inmates: two pre-G.E.D. programs, and one workshop/miscellaneous program course.
>
> 4. Reading Library. Protective Custody inmates are "denied total access to the reading library" which is located in the chapel area next to the law library.

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[7] The first paragraph of the Amended Complaint states: "The Equal Protection Clau[s]e g[i]ves Protective Custody Inmates a Constitutionally Protected Interest in prison jobs and Educational and Vocational Programs Equivalent to those afforded other inmates except to the extent of a demonstrated rational relationship between any difference in treatment and a legitimate state interest, of which there has been none shown. Prison officials cannot condition Protective Custody status that is predicated on danger of the safety of an inmate upon the forced surrender of those Liberty Interests, the court will observe." App., Ex. 4, A. 51.

[8] A typographical error in the Amended Complaint misattributes the phone line quantity. The text above corrects this error.

> 5. Food Service, Commissary Pricing, and Bug Extermination. Current conditions violate the Eighth and Fourteenth Amendments.

App., Ex. 4, A. 52-55. Although the two and a half page Amended Complaint did not re-allege the issues which the District Court had specifically permitted to proceed (security, access to the courts, religious services and cell conditions), it did not appear, and it has never been contended, that the *pro se* Plaintiff had abandoned them.

On April 21, 1988, the District Court denied Defendant's motion to dismiss, finding that the allegation of "inadequate security procedures stated a claim under the eighth amendment," as did the claim of "asbestos problems in their cells."[9] App., Ex. 6, A. 62, 63 at ¶¶ 1 and 2. Specifically, the District Court ruled that the complaint stated a cause of action for the following:

> (1) The Defendants acted with deliberate indifference to the safety of protective custody residents, through inadequate security procedures that subjected these residents to risk of harm from other inmates; and
>
> (2) The Defendants acted with deliberate indifference to the safety of inmates, through exposing inmates to asbestos that deprived them of minimal standards of habitable shelter.

App., Ex. 6, A. 62, 63 at ¶¶ 1 and 2. In another order of April 21, 1988, the District Court granted leave to file a Second Amended Complaint (additional time permitted for this amendment by subsequent orders). The Second Amended Complaint was filed June 21, 1989, by counsel whose appointment had been ordered on November 24, 1988.

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[9] The District Court dismissed claims of access to the courts because of a failure to assert that law library restrictions resulted in actual deprivation of access. Because the prison permitted attendance at "one religious service per week on Sunday mornings," the First Amendment religion claim was dismissed, with the court rejecting the claim that Protective Custody inmates are "not afforded the same opportunities to attend services and bible studies as are members of the general prison population." App., Ex. 6, A. 63 at ¶¶ 3 and 4.

The Second Amended Complaint added three defendant officials (the *pro se* Complaint had named one), and pursued the claims which the District Court had permitted to proceed. App., Ex. 7, A. 65, 66.[10] The Plaintiff sued as the sole plaintiff and raised the two issues which the District Court's earlier orders had left in the case: a) inadequate security resulting in exposure of inmates to substantial and unreasonable risk of physical harm from other inmates, and b) unreasonable and unnecessary exposure to the carcinogen asbestos in the D/Rear cells and common areas. App., Ex. 7, A. 68, 69 at ¶¶ 9 and 14. On exposure to asbestos, the Second Amended Complaint alleged that:

> During the entire period of time which Plaintiff spent in D Rear, he was surrounded by the known carcinogenic, [*sic*] asbestors, which was loosely wrapped around pipes and visibly present in the walls and ceilings of both the D Rear cells and common areas, and to which Plaintiff was constantly exposed.

App., Ex. 7, A. 69 at ¶ 14.[11]

On inadequate security, the Second Amended Complaint alleged that Protective Custody inmates "were exposed to a tremendous risk of harm from the general prison population." App., Ex. 7, A. 68 at ¶ 10. For example, the Second Amended Complaint alleged that a security gate "was often improperly guarded or not guarded at all, allowing the general population inmates easy access to the inmates housed in D Rear." App., Ex. 7, A. 68 at ¶ 9. Furthermore, "there were routinely no escorts available, and thus those inmates who need to venture beyond D rear were exposed to a tremendous risk of harm

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[10] With the Equal Protection issues struck from the case by the earlier interlocutory orders, the then-appointed counsel did to re-state them. The interlocutory dismissal of those claims are among the issues raised in this certiorari petition, the interlocutory dismissals having merged into the final judgment.

[11] The Second Amended Complaint further alleged that the Defendants were deliberately indifferent to Fontroy's complaint of exposure to asbestos. App., Ex. 7, A. 70, 73, 75, and 77 at ¶¶ 21, 31, 41, and 51.

from the general population inmates." App., Ex. 7, A. 68 at ¶ 10. As a result, the Plaintiff "was the victim of, witnessed, and learned of numerous crimes committed by the general population inmates against him and the other" Protective Custody inmates, including "beatings, stabbings, and other various forms of assaults, theft, threats and extortion." App., Ex. 7, A. 68, 69 at ¶ 13. The Second Amended Complaint sought a declaratory judgment, compensatory and punitive damages for violation of Plaintiff's Fifth, Eight and Fourteenth Amendment rights. App., Ex. 7, A. 71, 74, 76, and 78 at ¶¶ 26, 36, 46 and 56.

Rather than responding to the Second Amended complaint with a Rule 12(b)(6) motion to dismiss or otherwise, Defendants filed an Answer on December 11, 1989 denying the allegations.

Defendant Owens filed a motion for summary judgment on December 21, 1990 (a ruling on the validity of service on the remaining three defendants was pending at the time), including no evidentiary material except a one-page affidavit on the dates of the Plaintiff's incarceration at Holmesburg. App., Ex. 8, A. 82. at n.1. Plaintiff responded to the summary judgment motion on January 23, 1991, and described the issues in the original *pro se* 1987 Complaint which counsel explained had been "refined somewhat" in the Second Amended Complaint. App., Ex. 9, A. 113. Plaintiff argued, first, that Defendants had failed to show the absence of any factual dispute and, second, that, with regard to lack of specificity arguments, the "law of the case" required that these same issues litigated on the motion to dismiss could not be litigated again on summary judgment. App., Ex. 9, A. 118-121. "The Court has ruled on Defendants' Motion to Dismiss and Defendants are not entitled to rehash these same issues by submitting a second Motion to dismiss under the guise of a motion for Summary Judgment."[12] App., Ex. 9, A. 120.

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[12] Plaintiff had repeatedly attempted to obtain discovery from Defendants, with limited success. Due to the Defendant's failure to provide answers and responses to Plaintiff's two sets of written discovery, Plaintiff

On May 1, 1991, the District Court granted Defendants' motion for summary judgment regarding Plaintiff's alleged exposure to asbestos in the Protective Custody Units. App., Ex. 10, A. 133. The District Court found "no evidence that Plaintiff currently suffered symptoms of harmful exposure to asbestos" and that recent medical reports showed no asbestos-related injury. App., Ex. 10, A. 135. The District Court said, "[w]ithout evidence of injury related to exposure to asbestos, there is not genuine issue of material fact pertaining to plaintiff's asbestos claims." App., Ex. 10, A. 135. Even though Defendants failed to disprove the presence of asbestos at the prison, the lack of present injury prevented such inquiry.

Although Fontroy had emphasized in detail the physical dangers to which he was subjected while in Protective Custody, the District Court also dismissed the claim of inadequate prison security, treating Defendant's request as a Rule 12(b)(6) motion to dismiss due to the lack of specific detail. App., Ex. 10, A. 135, 136. The District Court declined to offer time to file amended pleadings to this issue.[13] App., Ex. 10, A. 138.

The District Court contended that the Second Amended Complaint is actually a "new" complaint only because Fontroy is the sole plaintiff. As a result, the District Court said it was able to dismiss under Rule 12(b)(6) because the prior Rule 12(b)(6) motion applied to the Amended Complaint, which the District Court considered to be a "different" complaint. App., Ex. 10, A. 135 at n.3. This also enabled the

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filed a motion to compel which was granted on August 9, 1990. Yet, Defendants provided only written discovery from Defendant Owens. As of the time of the judgment below, Defendants Pernsley, Curione, and Moore had not yet responded to Plaintiff's outstanding written discovery, and their counsel had yet to make them available for depositions, despite Plaintiff's counsel's repeated requests. Due to the obstructive tactics employed by Defendants, Plaintiff's discovery is far from complete. App., Ex 9, A. 113, 114.

[13] The District Court also held that the City of Philadelphia Defendants are not protected from damage claims by the Eleventh Amendment. App., Ex. 10, A. 138. No Eleventh Amendment issue is presented in this certiorari petition.

District Court to dismiss the complaint without providing the Plaintiff with an opportunity to amend, which is required under summary judgment practice.

In addition, the District Court reasoned that it had provided the Plaintiff with many opportunities to amend. App., Ex. 10, A. 137, 138. Yet, if this Second Amended Complaint is considered a "new" complaint for Rule 12(b)(6) purposes, any past opportunities to amend should be irrelevant since they apply to those amended complaints.

In response to Plaintiff's *pro se* Rule 59(e) motion to amend the judgment, the District Court on August 19, 1991 granted the motion with respect to the asbestos claims, finding that the medical report the District Court had relied on earlier was not to detect asbestos-related injury. App., Ex. 11, A. 141. Therefore, the judgment on this claim for Defendants was vacated while the other portions of the earlier order were re-affirmed. App., Ex. 11, A. 142.

On November 20, 1991, the vacated asbestos-injury judgment was reinstated, after a second medical report was negative for such injury. App., Ex. 12, A. 144. Plaintiff's motions for appointment of an impartial medical expert and to amend the Second Amended Complaint were denied. App., Ex. 11, A. 145, 146.

The appeal to the United States Court of Appeals for the Third Circuit involved the issues dismissed in the April 28, 1987, May 1, 1991 and August 19, 1991 Orders. These Orders involve the involuntary exposure to asbestos claim, the claim of inadequate security, and all of the original Equal Protection claims, including equal access to paid employment, telephone and television service, education, law and reading libraries, religious services, tobacco products and the stipulations agreed in *Jackson v. Hendrick* issues. The Court of Appeals appointed David Ferleger, Esq., previously uninvolved in the case, as counsel on the appeal.[14]

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[14] David Ferleger is also counsel here on this petition for a writ of certiorari.

In a decision without a written opinion, the Court of Appeals entered judgment on February 25, 1993 and affirmed the lower court's judgment. App., Ex. 14, A. 148. The decision is reported in the table at 989 F.2d 486 (3d Cir. 1993).

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Court of Appeals' decision is contrary to *Helling v. McKinney*, ___ U.S. ___, 61 U.S.L.W. 4648 (June 18, 1993) (on tobacco smoke), and with holdings of the Fourth and Eleventh Circuits because an inmate's involuntary exposure to a serious health risk raises an Eighth Amendment claim, even absent present injury; further conflicts exist among the circuits on the asbestos exposure issue.

Plaintiff Fontroy specifically alleged that he was unreasonably and unnecessarily exposed to the carcinogen asbestos, which was visible in the D/Rear (protective custody) cells and common areas. Citing only three unreported Pennsylvania district court decisions, the District Court found that exposure to asbestos, without present proven injury, is never actionable.[15] App., Ex. 10, A. 135. This decision, based purely on the law, was rendered prior to *Helling v. McKinney*, ___ U.S. ___, 61 U.S.L.W. 4648 (June 18, 1993).[16]

The Third Circuit Court of Appeals' decision is contrary to the requirements of *McKinney*, which involves an inmate's

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[15] It is not by chance that the United States District Court for the Eastern District of Pennsylvania established such an absolutist rule forbidding any presentation of any asbestos exposure claim. The District Court (by various judges) has routinely and repeatedly dismissed every claim on such issue. *See Robinson v. Vaughn*, 1992 WL 368461 (E.D. Pa., Dec. 2, 1992); *Hannibal v. Lyons*, 1990 WL 96121 (E.D. Pa., July 2, 1990) ("In the case at bar, plaintiff has not been diagnosed as having any asbestos-related illness. Until such a diagnosis confirms a related illness or injury, plaintiff may not bring an action for personal injuries."). *See* A. 94, A. 96, A. 102.

[16] The purported factual basis was the result of an x-ray of Fontroy's chest; under *McKinney*, such evidence is irrelevant.

involuntary exposure to the lesser health risk of environmental tobacco smoke. *Id.* In *McKinney*, this Court found that an inmate's exposure to environmental tobacco smoke raises an Eighth Amendment claim, even absent present injury. *Id.* at 4650. This Court's decision would seem to create a conflict with the Court of Appeals' decision since asbestos is a more harmful carcinogen than environmental tobacco smoke. As to the circuit courts, an intra-circuit conflict exists regarding the actionability of an inmate's involuntary exposure to asbestos. The Third Circuit Court of Appeals' decision is in conflict with the decisions of the Fourth and Eleventh Circuits; the First and Sixth Circuits are in accord with the Third Circuit. Hence, a dispute exists among the circuits which must be resolved by this Court.

In addition to the resolution of intra-circuit conflict, the granting of certiorari on this issue would resolve an important question regarding the civil rights of inmates in this country. If, as this Court has held, exposure to environmental tobacco smoke states a cause of action, then it seems apparent that exposure to asbestos is cognizable under the Eighth Amendment since exposure to asbestos is much more of a health risk than environmental tobacco smoke. On the other hand, if asbestos exposure is not covered by *McKinney*, then it is appropriate for the Court at this time to make this limited scope of *McKinney* clear to the courts below. Given the tremendous conflict among the lower courts which the asbestos issue had engendered, it is a subject timely for review by this Court.

A. The Court of Appeals' decision is contrary to the rationale of *Helling v. McKinney*, ___ U.S. ___, 61 U.S.L.W. 4648 (June 18, 1993).

This Court has recently held that the Eighth Amendment's ban on cruel and unusual punishment provides a basis for suits against an inmate's custodians over the adverse long-term health effects that allegedly result from involuntary exposure to an unreasonable health risk. *Helling v. McKinney*, 61 U.S.L.W. 4648 (June 18, 1993). An inmate states a cause

of action by alleging that prison officials have, with deliberate indifference, exposed him to unreasonable levels of environmental tobacco smoke that pose a risk to his future health. *Id.* at 4650.[17] An inmate need not prove that the conditions he or she challenges have caused a "current" health problem. *Id.*[18]

As environmental tobacco smoke is ranked among the more hazardous carcinogens, the potential harm caused by the exposure to asbestos is clearly more dangerous than that from smoke. The Court of Appeals did not have the benefit of this Court's *McKinney* decision when it affirmed the District Court's now-rejected approach. The District Court held that "[w]ithout evidence of injury related to exposure to asbestos, there is no genuine issue of material fact pertaining to plaintiff's asbestos claims." App., Ex. 10, A. 135.[19] In light of *McKinney*, however, Fontroy states a cause of action under the Eighth Amendment by alleging that Defendants have with

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[17] The actions by the prison officials must, of course, be intentional. *See Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991) (prisoners claiming that conditions of confinement constituted cruel and unusual punishment were required to show deliberate indifference on part of prison officials); *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference to serious medical needs of prisoners violates Eighth Amendment because it constitutes unnecessary and wanton infliction of pain contrary to contemporary standards of decency). In the case at bar, Fontroy alleged that he had repeatedly communicated to the Defendants "that he was being subjected to an unreasonable and substantial risk of harm and that he was being deprived of the minimum civilized measure of life's necessities." App., Ex. 7, A. 70, 73, 75 and 77 at ¶¶ 21, 31, 41, and 51. The Defendants responded to his complaints with deliberate indifference. *Id.*

[18] *See McKinney*, 61 U.S.L.W. 4648 (June 18, 1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978) ("A serious communicable disease was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.")).

[19] This contra-*McKinney* analysis is routine in the courts in the Eastern District of Pennsylvania. *See* Note 15 *supra*.

deliberate indifference exposed him to asbestos which poses an unreasonable risk of serious damage to his future health, regardless of the currently diagnosed injury.

Fontroy's Second Amended Complaint very specifically alleged that he was "constantly exposed" to the known carcinogen, asbestos, in both the Protective Custody unit cells and common areas, and that such exposure "will in the future" cause him injury:

> During the time when Plaintiff was incarcerated in the D Rear, he was surrounded by the known carcinogenic, [*sic*] asbestos, which was loosely wrapped around pipes and visibly present in the walls and ceilings of both the D Rear cells and common areas, and to which Plaintiff was constantly exposed.

App., Ex. 7, A. 69 at ¶ 14. The asbestos to which Fontroy has been involuntarily exposed is such that his future health is unreasonably endangered, and as a result, Fontroy's claim should be heard, the judgment reversed and remanded to permit him to prove his case.[20]

After *McKinney*, a court must inquiry whether the health risk of which an inmate complains is one that today's society chooses to tolerate. *McKinney*, at 4650. Similar to the exposure to environmental tobacco smoke, asbestos results in cumulative harm that does not manifest itself for a considerable period of time. The life-threatening nature of the exposure to asbestos was well-established at least by the 1980's; involuntary asbestos exposure is without doubt a risk that today's society will not tolerate. It cannot be that prisoners confined without choice are a special subgroup which can be deliberately exposed to asbestos by prison administrators conscious of the life-threatening nature of their actions.

Defendants cannot simply "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering in the next week or month or year." *Id.* This Court suggested that an inmate would not have to suffer an attack from dysentery to have a cause of action for unsafe

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[20] Retroactivity is not an issue because the claim is still pending in court.

drinking water. *Id.* "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened." *Id.* Here, Fontroy was being involuntarily exposed to visible asbestos while in Protective Custody. It is respectfully submitted that Fontroy states a cause of action, and that the contrary holding below is foreclosed by *McKinney*.

B. The Court of Appeals' decision conflicts with decisions of the Fourth and Eleventh Circuits regarding the actionability of exposure to asbestos, but is consistent with decisions of the First and Sixth Circuits.

This Court of Appeals' decision, affirming the District Court's contra-*McKinney* approach, conflicts with the decisions of the Fourth and Eleventh Circuits regarding the viability of claims of exposure to asbestos while in prison. However, the Court of Appeals' decision is in accord with those of the First and Sixth Circuits. Therefore, a genuine dispute exists among the circuits concerning the actionability of an inmate's exposure to asbestos.

The Eleventh Circuit finds a prison asbestos claim to be viable. In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), prison authorities ignored a federal inmate's requests to be removed from his dormitory after he claimed that he was forcibly exposed to asbestos. *Id.* at 1461-62. This claim sufficiently alleged an Eighth Amendment cruel and unusual punishment violation to withstand a motion to dismiss. *Id.* at 1464. The court held:

> In the present case, the plaintiff's complaint, liberally construed, appears to allege a violation of the Eighth Amendment through the defendants' deliberate indifference to the plaintiff's serious medical needs. The plaintiff alleges that the defendants forced him to remain in a dormitory when the dormitory atmosphere was filled with friable asbestos. Further, the plaintiff alleges that the defendants knew of the health danger and yet refused to move

> the plaintiff to an asbestos-free environment. This constitutes deliberate indifference to the plaintiff's serious medical needs.

Id. at 1463 (note omitted).

In *Rice v. North Carolina Dep't of Corrections*, 873 F.2d 1440 (table; text in Westlaw) (4th Cir. 1989), an inmate's complaint alleged that he was being subjected to cruel and unusual punishment by exposure to asbestos insulation on exposed pipes throughout the correctional unit. *Id.* Although it could not be determined from the face of the inmate's claim to what extent the asbestos was in the air or how long he was exposed to the asbestos each day, the court of appeals held that the inmate's pleadings were sufficient to call for the opportunity to offer supporting evidence. *Id. Accord, Holley v. Robinson*, 911 F.2d 722 (table; text in Westlaw) (4th Cir. 1990) (inmate's claim regarding exposure to asbestos was not frivolous).[21]

In contrast, other circuits have dismissed such complaints as frivolous. *Moore v. Dahlberg*, 924 F.2d 1058 (table; text in Westlaw) (6th Cir. 1991) (*in forma pauperis* properly denied; claim of asbestos exposure in prison is frivolous); *Malley v. McGonigle*, 915 F.2d 1556 (table; text in Westlaw) (1st Cir. 1990) (claim of exposure to asbestos dismissed on ground that it failed to allege any sickness suffered by inmates).[22]

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[21] As the cases herein indicate, exposure to asbestos in prison is frequently litigated although some cases do not reach the precise issue presented. *See Tincher v. Boatwright*, 989 F.2d 505 (table; text in Westlaw) (8th Cir. 1993) (inmate alleged that sores caused by exposure to asbestos; claim dismissed for failure to prove that any damages caused by jail conditions); *Brown v. Corrections Cabinet*, 918 F.2d 178 (table; text in Westlaw) (6th Cir. 1990) (exposure to asbestos in prison cell; dismissed because complaint did not allege that the warden was responsible for the asbestos); *Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988) (exposure to dangerous levels of asbestos; appellate review of orders awarding interim attorney fees and expert fees was appropriate).

[22] Some district court decisions reject particular claims for asbestos exposure. For example, in *Chaka v. Lane*, 1989 WL 18221 (N.D. Ill.,

II. The Court of Appeals' decision conflicts with decisions of the First, Fifth, Seventh, and Eighth Circuits because a court may not dismiss a non-frivolous Equal Protection claim of irrational denial of fundamental prison activities to a prisoner against inmates in non-punitive Protective Custody.

Inmates are routinely classified into various subgroups among the general prison population. Some inmates are administratively segregated for punishment, for dangerous misbehavior or for non-compliance with prison rules. Other inmates, such as Fontroy, have been placed in Protective Custody for their own protection, and not as a result of any negative behavior.[23] The categorizing of inmates may create situations in which inmates in certain subgroups are afforded more privileges or rights than other inmates. For those who are segregated for misbehavior, it makes sense that they be denied certain opportunities as punishment. There are also undoubtedly other rational reasons for differential treatment among inmate subgroups. However, for inmates in Protective Custody, the categorical denial of certain opportunities should at least be governed by the Constitutional principle that requires non-arbitrary and non-capricious treatment of all citizens.

The Third Circuit's decision is contrary to those of the First, Fifth, Seventh, and Eighth Circuits which have all held that Equal Protection requires that any differential treatment of prisoners in Protective Custody must have a rational basis. Fontroy does not argue that Equal Protection requires that Protective Custody inmates be granted precisely the same

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March 1, 1989), a prison asbestos case, the court dismissed the case for lack of standing in that there were no allegations that the prisoners were forced "to remain in the immediate vicinity of an area where such [asbestos] removal was taking place. Plaintiffs do not even allege that they themselves are or were housed in a cellhouse where disintegrating asbestos material is present."

[23] In addition, as alleged here, some inmates are in Protective Custody areas simply because the prison is out of space in the general population areas. App., Ex. 2, A. 27.

quantity, intensity or frequency of each activity in prison. There may certainly be reasons for different treatment of Protective Custody inmates related to the purpose of custody, or other penological reasons. However, any discrepancies between treatment of the general prison population and Protective Custody inmates must be rationally based. A district court must permit a non-frivolous complaint of the denial of Equal Protection to proceed, at least to the point of the prison officials explaining the basis for discrimination.[24]

Plaintiff Fontroy's *pro se* Complaint protested the violations of the Fourteenth Amendment with regard to equal access to paid employment, telephone and television service, education, law and reading libraries, religious services, tobacco products, and the stipulations of *Jackson v. Hendrick*, ___ Pa. ___, 503 A.2d 400 (1986). App., Ex. 2, A. 25-37. Fontroy's Complaint alleged that Protective Custody inmates received substantially different treatment than those in the general prison population without any rational justification.

As the Complaint explained in detail, Protective Custody inmates in D/Rear (Protective Custody) were not separated from the other inmates in D/Front to punish them for misbehavior, but rather to protect them from other inmates' assaults (or merely because of overcrowding elsewhere) App., Ex. 2, A. 25-37. The Complaint contended that nothing in the physical structure of the prison or the nature of the Protective Custody program required such differential treatment. App., Ex. 2, A. 25-37. The Complaint alleged that these differences in treatment accorded to D/Rear inmates constituted "discrimination" which violated the Fourteenth Amendment's Equal Protection Clause.

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[24] In the case at bar, the District Court simply dismissed several Equal Protection claims, namely the claims relating to employment, telephone and television service, education, libraries, tobacco products and *Jackson v. Hendrick* issues, as frivolous on the Order of April 28, 1987 before any response had been filed by the Defendants. App., Ex. 3, A. 43. The District Court subsequently dismissed the two remaining Equal Protection claims, access to the courts and religious services, through the April 21, 1988 Order. App., Ex. 6, A. 63, 64.

The District Court dismissed a number of claims as frivolous, namely, the claims relating to employment, telephone and television service, education, libraries, tobacco products and *Jackson v. Hendrick* issues. App., Ex. 3, A. 43. *The District Court merely discussed these claims in isolation without mentioning the claim of discrimination between the D/Rear and D/Front inmates.* In other words, the District Court failed to compare the differences between what inmates in protective custody received and what the general prison population received. As a result, the District Court's decision forbids any litigation of any claim by Protective Custody inmates that they suffer from irrational discrimination in regard to conditions of confinement.

The District Court's approach, affirmed by the Court of Appeals, of analyzing only the components of a claim, and ignoring the classification rationale, is in direct conflict with the decisions of the First, Fifth, Seventh, and Eighth Circuits. No circuit has used such a deficient approach which simply ignores the Equal Protection aspect of an Equal Protection claim. Consistent with the Equal Protection Clause, each claim by Protective Custody inmates should have been subjected to an articulated analysis of whether discrimination was rationally based.

The differential negative treatment of people with special needs, without any rational basis, violates Equal Protection principles. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Accordingly, the unequal treatment of prisoners is only justified if it bears a rational relation to a legitimate state interest. *Nadeau v. Helgemoe*, 561 F.2d 411, 418 (1st Cir. 1977) (protective custody inmates' constitutional rights justify expanded library schedule);[25] *Williams v. Lane*,

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[25] In *Nadeau*, the court of appeals remanded to determine whether a disproportionate meal pattern, inadequate procedures for seeing visitors, severe restrictions on showers and outside exercise, and limited rehabilitative and work opportunities had a rational basis. *Id.* at 419-20.

851 F.2d 867 (7th Cir. 1988). In *Williams*, inmates in Protective Custody claimed that the defendants' provisions for living conditions were unequal in comparison with general population inmates. *Id.* The court found that the prison officials "failed to establish the necessary relationship between prison security and disparate treatment of residents of protective custody." *Id.*

Even with regard to privileges which rise above the constitutional minimum, Equal Protection requires non-arbitrary classification of inmates. *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986). In *Green*, an inmate claimed that prison officials "violated his right to equal protection while he was in administrative segregation because he was denied the same privileges, exercise periods and educational rehabilitative programs open to other prisoners." *Id.* at 1125. Rejecting the district court's dismissal of the claim on a Rule 12(b)(6) motion, the court of appeals held that the inmate had stated a claim. *Id.* The court found that

> [p]rison officials may, of course, arbitrarily determine whether to provide prisoners with privileges amounting to more than "reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Id.* But the state's power to distinguish between prisoners is always subject to the constitutional requirement that substantial and purposeful difference in treatment have some *rational* basis rather than being wholly arbitrary and capricious. *Fulford v. King*, 692 F.2d 11, 13 (5th Cir. 1982); *see Nadeau v. Helgemoe*, 561 F.2d 411, 416 (1st Cir. 1977).

Green, 788 F.2d at 1125 (emphasis added).

When considering discrimination between different subgroups within Protective Custody (a much closer question than that presented by Fontroy), the Eighth Circuit has held that prison officials cannot establish classifications unrelated to legitimate goals. *Divers v. Department of Corrections*, 921 F.2d 191, 194 (8th Cir. 1990). In *Divers*, an inmate in "lockdown" Protective Custody brought a § 1983 action against prison officials to challenge the different treatment of inmates

in the "general population" Protective Custody. *Id.* at 192. Reviewing the district court's dismissal of the complaint, the court of appeals found that the following claims were not frivolous: better treatment given to certain subgroups in protective custody, denial of religious services, allotment of only 45 minutes of exercise time per week, inadequate diet, inadequate clothing, and limitation on phone calls to attorneys. *Id.* at 193-94. The Defendants, therefore, are required to show that differential treatment was reasonably related to a legitimate state interest.

In the case at bar, because the Equal Protection issue was eliminated by a Rule 12(b)(6) motion, the Defendants never had to justify the discrimination. A court may not dismiss an Equal Protection claim on the basis of reasons undisclosed to the court. *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978); *See Sheley v. Dugger*, 824 F.2d 1551 (11th Cir. 1987) (remanded to determine whether inmate's continued confinement in close management is rational in absence of any reported objective evidence other than ten-year old prison violations); *Brandon v. District of Columbia Bd. of Parole*, 734 F.2d 56 (D.C. Cir. 1984) (government must prepare at least an answer since it is sufficiently plausible that equal protection claim could state cause of action). In *Durso*, the court, in reversing the district court's dismissal under Rule 12(b)(6), found that particularized facts may be left to discovery:

> The defendants may be able to establish the rationality of treating plaintiff differently. But a court ought not dismiss an equal protection claim on the basis of reasons unrevealed to the court. The State must come forward and identify the legitimate state interest being furthered.

Id. at 1372 (citations omitted).

It is certain that there is a factual dispute on this issue. Defendant Owens understood that this litigation involved the alleged discrimination against Protective Custody inmates, and he described the dispute as "understandable." App., Ex. 5,

A. 56, 58, and 60. Owens' correspondence with the Protective Custody inmates includes his agreement that the programs available to the general population are not available to those in protective custody.

> Due to the nature of your situation, it is necessary that certain privileges that individuals in general population have will not be available to you. I suppose the fundamental difference between us is that you are under the impression that all of the programs that are available to the general population should be available to those in protective custody. That is not the case, as I understand it.

App., Ex. 5, A. 56.[26]

The Court of Appeals' decision is in direct conflict with decisions of the First, Fifth, Seventh, and Eighth Circuits. The District Court cannot simply ignore the discrimination aspect of an Equal Protection claim. The District Court should have evaluated and compared the differences in treatment between Protective Custody and general population inmates.

Fontroy alleged sufficient facts to withstand dismissal. There was simply no burden upon Fontroy to produce more than his good-faith fact-based allegations. A claim of such discrimination must receive more than passing review in a district court. The issue could not have escaped the District Court's attention; virtually the entire original complaint was premised on the discrimination against Protective Custody inmates, and not on any alleged independent right to education, television or any other particular condition. Thus, Fontroy's complaint that discrimination between Protective Custody and general population inmates without any rational basis violates the Equal Protection Clause is one which requires review below. The judgment should be reversed. Such reversal would bring the Third Circuit's approach into

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[26] The Owens' correspondence does not establish a rational basis for the discrimination. It merely concedes that Fontroy is correct that such discrimination exists. Owens does not explain at all any basis for the discrimination. App., Ex. 5, A. 56, 58, and 60.

accordance with that of the First, Fifth, Seventh, and Eighth Circuits.

III. A claim of inadequate security in a prison, which was twice found to state a claim, may not be dismissed because the law of the case doctrine precludes dismissal, and because pre-dismissal adequate notice was not provided.

The Eighth Amendment protects inmates against the imposition of unreasonably dangerous conditions. *See Helling v. McKinney*, 61 U.S.L.W. 4648 (June 18, 1993).[27] The right to adequate security for inmates is well-established in the circuit courts as well.[28] Fontroy repeatedly alleged he was victimized by serious and pervasive violations of this right.

In 1991, the Defendants moved for a summary judgment. They did not seek a ruling under Rule 12(b)(6) that the inadequate security claim failed to state cause upon which relief could be granted. Since the Defendants had not filed any evidentiary materials supporting their summary judgment claims on the merits, Fontroy had a right to rely on "law of the case" doctrine and he did so in his briefing on summary judgment. After all, the District Court had twice sustained the

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[27] *See Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 2327 (1991) ("Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the *protection he is afforded against other inmates.*") (emphasis added).

[28] *See Young v. Quilan*, 960 F.2d 351 (3d Cir. 1992) (prison officials deliberately indifferent to repeated physical assaults on inmate by other inmates); *Fisher v. Koelher*, 902 F.2d 2 (2d Cir. 1990) (violence at correctional institute, both inmate-inmate and staff-inmate, had reached proportions that violate the Eighth Amendment); *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990) (double-celling was cruel and unusual punishment for protective custody inmates who were housed with inmates in administrative custody); *Gullatte v. Potts*, 654 F.2d 1007 (5th Cir. 1981) (dangers of placing known "snitch" in general prison population); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980) (violations of inmates' Eighth Amendment rights with regard to personal safety).

sufficiency of this allegation. However, without notice to the parties, the District Court decided to treat the summary judgment motion as a Rule 12(b)(6) motion to dismiss the complaint with regard to the inadequate security claim.

The District Court's actions were fundamentally unfair and contrary to two principles which facilitate expeditious litigation: the law of the case doctrine, and the requirements of pre-dismissal notice in circumstances such as these. This point itself is sufficient to support the grant of certiorari because of its importance to the litigation process and because otherwise an obviously valid claim (one upheld twice by the same court which in the end dismissed it) will be lost.

A. The Third Circuit's decision conflicts with the "law of the case" doctrine which precludes the District Court from dismissing under Rule 12(b)(6).

Since the claim dismissed by the District Court's 12(b)(6) 1991 order is the same claim initially filed by Fontroy and upheld in 1987 and 1988, the "law of the case" doctrine requires that the District Court should not have considered anew the very same issue on which Fontroy had twice succeeded earlier. *Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992) (law of the case principle holds that prior rulings in such cases should be subject to general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated); *Christian v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988) (court of appeal should achieve goal of conservation of judicial resources by adhering strictly to principle of law of the case); *Arizona v. California*, 460 U.S. 605 (1983) ("As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."). In

addition, the "law of the case" doctrine also has a strong foundation among the circuits.[29]

A ruling on a motion to dismiss becomes the "law of the case," and it is not appropriate for a court to accept a renewed motion on the same grounds. *E.g., Commercial Union of America v. Anglo-South American Bank*, 10 F.2d 937 (2d Cir. 1925) (order denying motion to dismiss complaint become law of the case, and on same facts and pleadings, it should be so treated by any other judge sitting in same case in that court).

It is unfair and a violation of the "law of the case" doctrine to grant a Rule 12(b)(6) dismissal in 1991 without notice, after the District Court allowed the claim to proceed in 1987 and denied a Rule 12(b)(6) motion to dismiss the same claim of inadequate security in 1988. Since Fontroy's initial complaint was twice not dismissed, Fontroy would have no reason to amend the complaint and had a right to rely on the "law of the case." The District Court, therefore, erred in treating Defendant's motion for summary judgment as a motion to dismiss the complaint.

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[29] *See New York State National Organization for Woman v. Terry*, 961 F.2d 390 (2d Cir. 1992) (under law of the case, court will adhere to its own decision at earlier stages of litigation, unless there are compelling reasons not to do so, such as intervening change of controlling law, availability of new evidence, or need to correct clear error or prevent manifest injustice); *Redfield v. Continental Gas Co.*, 818 F.2d 596 (7th Cir. 1987) (law of the case doctrine provides that when court decides upon the rule of law, that decision should continue to govern the same issues in subsequent stages of same case); *Little Earth of the United Tribes, Inc. v. United States Dep't of Housing and Urban Development*, 807 F.2d 1433 (8th Cir. 1986) (law of the case doctrine applies to issues decided explicitly or implicitly, in earlier stages of same case); *A & A Concrete, Inc. v. White Mountain Tribe*, 781 F.2d 1411 (9th Cir. 1986) (under law of the case, court is precluded from reexamining an issue previously decided in same court, or at higher court); *Gage v. General Motors*, 796 F.2d 345 (10th Cir. 1986) (law of the case designed to bring about quick resolution of disputes by preventing continued reargruments of issues already decided).

B. The Court of Appeals' decision conflicts with the decisions of the Second, Fifth, Ninth, Tenth, and Eleventh Circuits.

To avoid the finality of the "law of the case" doctrine, the District Court labeled Fontroy's Second Amended Complaint as a "new" complaint.

> By Order dated April 20, 1988, I denied defendants' motion to dismiss plaintiff's claim of inadequate security set forth in an earlier Complaint and Amended Complaint filed by plaintiff. The earlier filings were on behalf of multiple unnamed plaintiffs. This Order concerns plaintiff's Second Amended Complaint, in which he is the sole plaintiff.

App., Ex. 10, A. 135-36 at n.3. In other words, the Second Amended Complaint is "new" complaint only because Fontroy is now the sole plaintiff. As a result, the "law of the case" doctrine arguably might not apply to the previous 12(b)(6) motion.

Fontroy made the same allegations in his Second Amended Complaint as he did in his class action, and his Second Amended Complaint further added that he was personally the victim of the violence he has alleged. App., Ex. 7, A. 68-69 at ¶ 13.

This "new" complaint label also allowed the District Court to ignore the Defendant's summary judgment motion which would have provided Fontroy with an opportunity to amend. Therefore, the court was not precluded from treating Defendant's motion for summary judgment as a 12(b)(6) motion.

Although the District Court considers Fontroy's Second Amended Complaint to be a "new" complaint, the District Court still cannot dismiss the complaint under Rule 12(b)(6) without providing notice for an opportunity to amend. *Branum v. Clark*, 927 F.2d 698 (2d Cir. 1991) ("[c]ertainly the court should not dismiss without granting leave to amend at least once when liberal reading of the complaint gives any indication that a valid claim might be stated."); *Jamieson v.*

Shaw, 772 F.2d 1205 (5th Cir. 1985) (denial of leave to amend on sole basis of futility was improper; allegations stated Fourth Amendment claim); *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983) (district court abused its discretion in dismissing civil rights action without leave to amend when plaintiff could have stated claim); *Triplett v. Leflore Co., Okla.*, 712 F.2d 444 (10th Cir. 1983) (error not to permit plaintiff to amend his § 1983 claim after dismissal when it was not clear that no claim could be stated); *Thomas v. Farmville Mfg. Co.*, 705 F.2d 1307 (11th Cir. 1983) (district court abused its discretion in denying leave to amend after dismissal for failure to state a claim). A district court, therefore, should allow amendment if it appears at all possible that the plaintiff can correct the defect.

A district court also may only order a Rule 12(b)(6) dismissal on its own motion if process has been issued and served and the plaintiff is given notice and an opportunity to respond. *Murphy v. Lancaster*, 960 F.2d 746 (8th Cir. 1992) (sua sponte dismissal reversed where civil rights plaintiffs not afforded opportunity to respond); *Fredyma v. AT & T Network Sys, Inc.*, 935 F.2d 368 (1st Cir. 1991) (sua sponte dismissal without notice for failure to state cause of action was legally improper); *Oatess v. Sobolevitch*, 914 F.2d 428 (3d Cir. 1990) (complaint was improperly dismissed before service of process); *Morrison v. Tomano*, 755 F.2d 515 (6th Cir. 1985) (district court's sua sponte dismissal of complaint before defendants were served, without prior notice to plaintiff, was vacated); *Wong v. Bell*, 642 F.2d 359 (9th Cir. 1981) (court must give notice of its sua sponte intention to invoke Rule 12(b)(6) and afford plaintiff opportunity to submit written memorandum in opposition to such motion). Thus, if this is considered a "new" complaint, the District Court may only order a 12(b)(6) after an opportunity of notice to amend has been provided.

C. Accepted doctrine and fairness require the reversal of the dismissal of the claim of inadequate security.

A court may properly deny leave to amend where the plaintiff has had several opportunities to state a claim and has not been able to do so.[30] The District Court claims that Fontroy has never been denied the opportunity to amend his complaint. "[P]laintiff has never been denied the opportunity to amend his complaint and has twice refined it over that time I have entered four Orders granting plaintiff either permission or time to again amend his Complaint." App., Ex. 10, A. 137. Fontroy, however, has never been told by the District Court that his claim needed to be amended, and he has never been informed that his Amended Complaint is actually a new complaint.

Dismissal of the valid claim of inadequate security was extremely unfair. Fontroy does not argue that the District Court could not have reconsidered the specificity question, or even that the District Court could not demanded a detailed accounting of the inadequate security alleged. Absent notice of what the District Court was considering, Fontroy justifiably relied on the previous 12(b)(6) motion and had no reason to submit the detailed affidavits and other information which the 1991 specificity ruling required.

There was no reason for the District Court to go back to the already-resolved Rule 12(b)(6) specificity issue, at least without some fair "heads-up" to Fontroy so that he could cure the problem. Absent notice of what the District Court was considering, Fontroy justifiably relied on the 1988 12(b)(6) motion. If a court uses its discretion to treat a motion for summary judgment as a Rule 12(b)(6) Order, the court must act in such a way that is fundamentally fair to all sides in the

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[30] *See, e.g., John Birch Soc'y v. National Broadcasting Co.*, 377 F.2d 194 (2d Cir. 1967) (permission to amend denied where opportunity had been afforded and plaintiff had not submitted proposed amendment within time afforded by the court); *Laughlin v. Garnett*, 138 F.2d 931 (D.C. Cir. 1943) (denial of leave to file third amended complaint).

litigation. Fundamental fairness requires the reversal of the dismissal of the inadequate security claim under either the law of the case or the notice analysis.

CONCLUSION

For the above reasons, Petitioner Derrick Dale Fontroy respectfully prays that this Honorable Court grant his petition for a writ of certiorari and reverse the judgment of the court below.

Respectfully submitted,

DAVID FERLEGER
37 S. 20th Street, Suite 601
Philadelphia, PA 19103
(215) 567-2828

Attorney for Petitioner
Derrick Dale Fontroy

On the Brief:
CHRISTIAN SONDERGAARD, JR.

August 20, 1993

APPENDIX

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APPENDIX EXHIBIT 1

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PLAINTIFFS	ARB N	DEFENDANTS
FONTROY, DERRICK, et al.	vs.	OWENS, DAVID S. (#34) AND PERNSLEY, IRENE J.; AND CURIONE, GAETANO AND MOORE, HARRY

Chuck Ervin Explained
To Me That This
Case Is To
Remain "Closed".
11-21-91
Mailed 12-19-91
TPO CE qm

CAUSE PRISONER-CIVIL RIGHTS
CIVIL STATUTE UNDER WHICH THE CASE
(WRITE A BRIEF STATEMENT OF CAUSE)

RELATED TO 86-2906

ATTORNEYS

Derrick Fontroy, p.p.
~~Homesburg Prison~~
~~8215 Torresdale Avenue~~
~~Philadelphia, PA 19136~~

~~#42392-066~~
~~3901 Klein Blvd.~~
~~Lampoc, CA 93436~~
(ltr. 3/12/90)

~~Graterford Prison~~
~~P.O. Box 244~~
~~Graterford, PA 19426~~
~~P.O. Box 99901, #Y-7513~~
~~Pittsburgh, Pa. 15233~~

~~Y-7513~~
~~P.O. Box 200~~
~~Camp Hill, PA. 17001~~
~~0200~~
~~(Letter 11/6/90)~~

~~Mesirov, Gelman, Jaffe & Cramer~~
~~Fidelity Bldg. 15th Flr.~~
~~Phila., PA. 19109~~

(#25)
#P.P. #Y-7513 (letter 12/7/90)
Drawer K

~~Stradley, Ronon, Stevens & Young~~
~~1100 One Franklin Plaza~~
~~Phila., PA. 19102~~

(#26) Dallas, PA. 18612

~~Saul, Ewing, Remick & Saul~~
~~Gentre Sq. West, 38th Flr.~~
~~Phila., PA. 19102~~

(#27)

-COUNSEL SHEET CONTINUED-

~~Sidkoff, Pincus & Green~~
~~530 Walnut St. 12th Flr.~~
~~Phila., PA. 19106~~

(#28)

~~Lisa G. Miller, Esq.~~

(#30)
-CONTINUED-

DEFTS:
Michael F. Coates, Esq. (38)(50)
Carol S. Wells, Esq. (13)
Frederick M. Walton, Jr.
Assistant City Solicitor
1101 Market Street, 9th Floor
Phildelphia, PA 19107-2996
Leon A. King, II, esquire (86)

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS

COUNSEL SHEET CONTINUED **FILING FEES PAID**

DATE RECEIPT NUMBER C.D. NUMBER

STATISTICAL CARDS
CARD DATE MAILED

JS-5 _____
JS-6 3/91

DATE	NR.	C.A. 86-4958 TO'N PROCEEDINGS
AUG	21	Plff's application for leave to proceed in forma pauperis, statement in support thereof, filed.
1987		
APR	15	Plff's petition of mandamus, filed.
"	28	MEMORANDUM & ORDER THAT LEAVE TO PROCEED IN FORMA PAUPERIS IS GRANTED. PLFF'S CLAIMS RE: EMPLOYMENT, TELEPHONE ACCESS, TV VIEWING, EDUCATIONAL & REHABILITATIONAL PROGRAMS ADMITTANCE TO LIBRARY TO TOBACCO PRODUCTS ARE DISMISSED AS FRIVOLOUS. THE REMAINING ALLEGATIONS ARE TO BE FILED, THE SUMMONS IS TO ISSUE, SERVICE IS TO BE MADE & A COPY OF THIS ORDER IS TO BE DIRECTED TO PLFF, ETC., FILED. 4/28/87: Entered and copies mailed.
(1) "	28	Complaint, filed.
– "	28	Summons Exit (USM-285 Attached).
– "	28	PLFF'S MOTION FOR APPOINTMENT OF COUNSEL, FILED.
4 "	30	ORDER THAT PLFF'S PETITION FOR MANDAMUS IS DENIED, FILED. 4/30/87: Entered and copies mailed.

5 MAY	04	PLFF'S MOTION FOR APPT. OF COUNSEL, AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS & FOR APPT. OF COUNSEL, PROOF OF SERVICE, FILED.
6 "	12	Summons returned, served David S. Owens by mail on 4/29/87; signed 5/4/87, filed.
7 JUN	02	DEFT'S MOTION TO DISMISS COMPLAINT, MEMO., CERT. OF SERV., FILED.
8 "	09	Amended Complaint, Proof of Service, filed.
9 JUL	13	Plff's notice to Court, filed.
10 AUG	19	PLFF'S MOTION FOR LEAVE TO TAKE DEPOSITIONS, PROOF OF SERVICE, FILED.
11 OCT	13	Plffs notice to the Court, filed.
12 "	19	PLFFS MOTION FOR AN ORDER COMPELLING DISCOVERY, FILED.
13 "	20	Defts response to Plffs Notice to the Court dated 10-7-87, Certificate of Service, filed.
14 "	28	Plffs objection to defts response to plaintiff notice to the Court dated 10-7-87, filed.
15 NOV	6	PLFFS MOTION FOR LEAVE TO FILE TO AMEND THE CAPTION, FILED.
16 "	13	Plffs response to defts Motion to Dismiss complaint, filed.
17 DEC	30	PLFFS MOTION FOR AN ORDER COMPELLING DISCOVERY, FILED.
18 "	30	PLFFS MOTION TO STRIKE OBJECTION, FILED.

1988

19 APR	21	ORDER THAT MOTION OF DAVID S. OWENS TO DISMISS IS GRANTED IN PART AND DENIED IN PART, ETC., FILED. 4/21/88 entered & copies mailed.
20 "	21	ORDER THAT PLFF'S MOTION TO AMEND THE CAPTION IS DENIED. PLFFS ARE GRANTED LEAVE TO AMEND ETC. PLFFS' ARE GRANTED THIRTY DAYS FROM THE DATE OF THIS ORDER TO AMEND THEIR COMPLAINT ACCORDINGLY, FILED. 4/21/88 entered & copies mailed.
21 "	26	PLFFS MOTION FOR AN ORDER COMPELLING DISCOVERY, FILED.
22 MAY	2	PLFFS MOTION FOR APPOINTMENT OF COUNSEL, AFFIDAVIT IN SUPPORT, MEMORANDUM OF LAW, PROOF OF SERVICE, FILED.
23 "	9	PLFFS MOTION FOR EXTENSION OF TIME, FILED.
24 NOV	2	ORDER THAT PLFFS UNOPPOSED MOTIONS FOR APPOINTMENT OF COUNSEL, EXTENSION OF TIME AND AN ORDER TO COMPEL DISCOVERY ARE GRANTED. PLFFS ARE GRANTED THIRTY DAYS FROM THE DATE OF APPOINTMENT OF COUNSEL TO AMEND THEIR COMPLAINT ACCORDINGLY, ETC., FILED. 11/2/88 entered and copies mailed.
25 "	8	ORDER APPOINTING MESIROV, GELMAN, JAFFE & CRAMER TO REPRESENT THE PLAINTIFF, FILED. 11/8/88 entered and copy mailed.

26 "	18	ORDER REVOKING THE APPOINTMENT OR MESIROV, GELMAN, JAFFE & CRAMER AND APPOINTING STRADLEY, RONON, STEVENS & YOUNG AS SUBSTITUTE COUNSEL, FILED. 11/18/88 entered and copy mailed. 11/17/88 copies mailed by M.M.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
DERRICK FONTROY, ET AL
DEFENDANT
DAVID S. OWENS, ET AL
DOCKET NO. 86-4958

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DATE	NR.	PROCEEDINGS
1988		
27 DEC	8	ORDER REVOKING THE APPOINTMENT OF STRADLEY, RONON, STEVENS & YOUNG AND APPOINTING SAUL, EWING, REMICK & SAUL AS SUBSTITUTE COUNSEL, FILED. 12/8/88 entered and copy mailed. 12/5/88 copies mailed by Marie March.
1989		
28 JAN	23	ORDER REVOKING THE APPOINTMENT OF SAUL, EWING, REMICK & SAUL AND APPOINTING SIDKOFF, PINCUS & GREEN AS SUBSTITUTE COUNSEL, FILED. 1/23/89 entered and copy mailed. 1/20/89 copies mailed by Marie March.
29 MAR	20	PLFFS MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT, FILED.

30	APR	13	Appearance of Lisa G. Miller, Esq., for plaintiff, filed.
31	MAY	10	ORDER THAT THE STIPULATION THAT PLFF MAY FILE AN AMENDED COMPLAINT OR [sic] OR BEFORE MAY 24, 1989, FILED. 5/11/89 entered and copies mailed.
32	"	25	STIPULATION & ORDER THAT PLFFS' AMENDED COMPLAINT SHALL BE DUE ON 5/31/89, FILED 5/25/89 entered & copies mailed.
33	JUN	16	ORDER & STIPULATION THAT PLFFS AMENDED COMPLAINT, WHICH HAD BEEN DUE ON 5-31-89, SHALL BE DUE ON JUNE 21, 1989, FILED. 6/16/89 entered and copies mailed.
34	"	21	Plffs second amended complaint, certificate of service, filed.
35	OCT	26	Plffs important notice, filed.
36	NOV	13	PLFFS MOTION FOR DEFAULT JUDGMENT & MEMORANDUM OF LAW IN SUPPORT & AFFIDAVIT, MEMORANDUM, PROOF OF SERVICE, AFFIDAVIT, FILED.
37	DEC	11	Deft. City of Phila.'s answer to second amended complaint, filed.
38	"	15	Deft demand for jury trial, filed.
1990			
39	MAR	8	ORDER THAT THIS COURTS ORDER OF 2-14-90 APPOINTING SIDKOFF, PINCUS & GREEN IS REVOKED AND DUANE, MORRIS & HECKSCHER IS APPOINTED AS SUBSTITUTE COUNSEL, FILED. 3/8/90 entered and copies mailed.

40	"	26	ORDER THAT COURT ORDER OF 3/7/90, APPOINTING DUANE, MORRIS & HECKSCHER AS COUNSEL FOR PLFF IS REVOKED AND LISA G. MILLER, ESQ. OF SIDKOFF, PINCUS & GREEN IS APPOINTED AS SUBSTITUTE COUNSEL, FILED. 3/26/90 entered and copies mailed.
41	MAY	30	ORDER THAT ALL DISCOVERY BE COMPLETED BY 9/28/90; COUNSEL SHALL FILE THEIR PRETRIAL MEMORANDA NAD [SIC] POINTS FOR CHARGE ON 9/28/90; THIS CASE IS LISTED FOR TRIAL TO COMMENCE ON 10/16/90, ETC., FILED. 5/30/90: ENTERED AND COPIES MAILED.
42	JUN	18	PLFFS' MOTION FOR IMMEDIATE TRANSFER FROM U.S.P. LOMPOC TO STATE CORRECTIONAL INSTITUTION PITTSBURGH, CERTIFICATE OF SERVICE, FILED.
43	AUG	7	PLFFS MOTION TO COMPEL ANSWERS TO INTERROGATORIES (SETS I AND II) AND RESPONSES TO DOCUMENT REQUESTS (SETS I AND II), CERTIFICATION, CERTIFICATION OF SERVICE, FILED.
44	"	09	ORDER THAT PLFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES ANd RESPONSES TO DOCUMENT REQUESTS IS GRANTED; DEFTS SHALL FILE FULL AND COMPLETE ANSWERS TO PLFFS INTERROGATORIES AND DOCUMENT REQUESTS WITHIN 15 DAYS OR SUFFER SUCH SANCTIONS AS THE COURT MAY IMPOSE, FILED. 8/9/90: ENTERED AND COPIES MAILED.

45 SEPT	12	ORDER THAT PLFF'S MOTIONS TO TRANSFER FROM FEDERAL CUSTODY TO STATE CUSTODY AND OF THE SUPPORTING MEMORANDA IS DENIED, FILED. 9/13/90: ENTERED AND COPIES MAILED.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
DERRICK DALE FONTROY
DEFENDANT
DAVID S. OWENS, ET AL
DOCKET NO. 86-4958
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DATE	NR.	PROCEEDINGS
1990		
46 SEP	13	ORDER THAT THE WARDEN OF FCI LOMPAC [sic], CALIFORNIA PRODUCE DERRICK DALE FONTROY ON TUESDAY, OCTOBER 16, 1990, AT 9:30 A.M., BEFORE JUDGE O'NEILL, JR., IN COURTROOM 14B TO APPEAR FOR TRIAL, ETC., FILED. 9/14/90 entered and copies mailed.
47 "	14	PLFFS MOTION FOR SANCTIONS AND FOR AN ENLARGEMENT OF THE DISCOVERY PERIOD, MEMORANDUM OF LAW, CERTIFICATION OF SERVICE, FILED.
48 "	17	ORDER THAT THE ORDER, DATED SEPTEMBER 12, 1990, DIRECTING THE WARDEN OF FCI LOMPOC AND THE U.S. MARSHAL TO PRODUCE THE PLAINTIFF ON TUESDAY, OCTOBER 16, 1990, IS VACATED, FILED. 9/18/90 entered and copies mailed.

49	"	17	ORDER THAT TRIAL OF THIS ACTION WILL COMMENCE AT 9:30 A.M., ON MONDAY, JANUARY 21, 1991. ALL DISCOVERY IS TO BE COMPLETED BY FRIDAY, DECEMBER 28, 1990, ETC. PURSUANT TO 28 U.S.C. § 636(b)(1)(A) PLFFS MOTION FOR SANCTIONS, AND ALL OTHER DISCOVERY DISPUTES WHICH MAY ARISE, IS REFERRED TO THE HONORABLE M. FAITH ANGELL FOR DECISION, FILED. 9/18/90 entered and copies mailed.
50	"	18	DEFENDANTS MOTION FOR LEAVE OF COURT TO DEPOSE PRISONER DERRICK FONTROY, MEMORANDUM, CERTIFICATE OF SERVICE, FILED.
(50)	"	21	ORDER THAT UNOPPOSED MOTION FOR LEAVE TO COURT OF DEFTS TO DEPOSE PRISONER DERRICK FONTROY BY TELEPHONE IS HEREBY GRANTED, FILED. 9-24-90 ENTERED & COPIES MAILED.
51	"	24	(PLFFS) NOTICE OF MOTION FOR EMPLOYMENT OF EXPERT WITNESS AT COUNTY EXPENSE, AFFIDAVIT IN SUPPORT, CERTIFICATE OF SERVICE, FILED.
52	OCT	11	ORDER THAT THE DEFTS HAVE TEN DAYS FROM THE DATE OF THIS ORDER TO FILE AN ANSWER OR RESPONSE, WITH A BRIEF, IN OPPOSITION TO PLFF'S MOTION FOR SANCTIONS, AND TO SERVE PLFF'S COUNSEL WITH A COPY. FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN THE TREATMENT OF PLFF'S MOTION FOR SANCTIONS AS UNCONTESTED, FILED. 10/12/90: ENTERED AND COPIES MAILED.

53	"	19	Defendant's answer to plaintiff's motion for sanctions and for enlargement of the discovery period, memorandum of law, certificate of service, filed.
54	"	29	Plffs notice to the Court re: acknowledgment of receipt of legal missive dated October 19, 1990, advising plaintiff he no longer has direct access to above grievance, leaving counsel responsible for all decisions in this action, filed.
55	"	30	ORDER THAT COUNSEL FOR DEFENDANT(S) HAS FIVE (5) WORKING DAYS FROM THE DATE OF THIS ORDER TO DELIVER (THE FOLLOWING) DISCOVERY TO PLAINTIFFS COUNSEL, ETC. PLFF IS SCHEDULED FOR A TELEPHONE DEPOSITION NOVEMBER 27, 1990, ETC. PLFFS MOTION FOR SANCTIONS WILL BE HELD IN ABEYANCE PENDING FULL COMPLIANCE WITH THIS ORDER, FILED. 10/31/90 entered and copies mailed.
56	NOV	7	Plff's memorandum of law in reply to the service issue raised by defendants in response to plaintiff's motion for sanctions, memorandum of law in support, certification of service, filed.
57	"	14	(Defts) surreply to plaintiff's memorandum of law in reply to the service issue raised by defendants in response to plaintiff's motion for sanctions, filed.
58	DEC	4	ORDER THAT THE QUESTION WHETHER DEFTS PERNSLEY, CURINOE AND MOORE HAVE BEEN PROPERLY SERVED IS REFERRED TO THE HONORABLE M. FAITH ANGELL FOR DETERMINATION, FILED. 12/6/90 entered and copies mailed.

59	"	21 REPORT AND RECOMMENDATION THAT SERVICE OF PROCESS ON DEFTS PERNSLEY, CURIONE AND MOORE IN THEIR OFFICIAL CAPACITIES HAS BEEN ACCOMPLISHED AND THAT THESE THREE DEFTS BE ORDERED TO ANSWER ALL DISCOVERY REQUESTS BY PLFF, ETC., FILED. 12/21/90: ENTERED AND COPIES MAILED.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
DERRICK FONTROY, ET AL
DEFENDANT
DAVID S. OWENS, ET AL
DOCKET NO. 86-4958
PAGE 4 OF _____ PAGES

DATE	NR.	PROCEEDINGS
1990		
60 DEC	21	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, MEMORANDUM OF LAW IN SUPPORT, CERTIFICATION OF SERVICE, FILED.
61 Dec	28	ORDER THAT ALL DISCOVERY WILL BE COMPLETED BY FEBRUARY 21, 1991, FILED. 12-28-90, ENTERED & COPIES MAILED.
1991		
(59) JAN	10	ORDER THAT THE REPORT AND RECOMMENDATION IS APPROVED AND ADOPTED. SERVICE OF PROCESS AS TO DEFENDANTS PERSLEY, CURIONE AND MOORE IN THEIR OFFICIAL CAPACITIES HAS BEEN ACCOMPLISHED. DEFENDANTS PERNSLEY,

CURIONE AND MOORE ARE ORDERED TO RESPOND TO PLAINTIFFS DISCOVERY REQUESTS, FILED. 1/10/91 entered and copies mailed.

62 " 16 PLAINTIFF'S MOTION TO COMPEL A CHEST X-RAY, MEMORANDUM OF LAW IN SUPPORT, CERTIFICATION OF SERVICE, FILED.

63 " 16 ORDER THAT THE SUPERINTENDENT OF THE S.C.I. AT DALLAS ARRANGE FOR A CHEST X-RAY TO BE PERFORMED ON PLFF DERRICK DALE FONTROY, INMATE #AY-7513, WITHIN TEN (10) DAYS AND THAT THE RESULTS BE FURNISHED TO PLFFS COUNSEL, FILED. 1/17/91 entered and copies mailed.

64 " 16 ORDER THAT THE JOINT STIPULATION BETWEEN COUNSEL FOR THE PARTIES THAT PLFFS BRIEF IN OPPOSITION TO DEFTS MOTION FOR SUMMARY JUDGMENT WILL NOW BE DUE ON JANUARY 23, 1991, FILED. 1/17/91 entered and copies mailed.

65 " 23 Plaintiff's response to defendants' motion for summary judgment, memorandum of law, certificate of service, filed.

66 FEB 19 ORDER THAT PARTIES SHALL SUBMIT BRIEFS ON ISSUE OF WHETHER PLFFS CLAIMS AGAINST STATE OFFICIALS FOR MONEY DAMAGES ARE BARRED BY THE ELEVENTH AMENDMENT. DEFTS BRIEF DUE ON OR BEFORE 3-7-91; PLFFS BRIEF DUE ON OR BEFORE MARCH 21, 1991. THE COURT WILL DEFER HIS DECISION ON DEFTS MOTION FOR SUMMARY JUDGMENT PENDING THE RECEIPT OF THE

REQUESTED BRIEFS, FILED. 2/19/91 entered and copies mailed.

67 " 20 DEFENDANTS, DAVID S. OWENS, IRENE PERNSLEY, GAETANO CURION AND HARRY MOORE'S MOTION TO DETERMINE SUFFICIENCY OF PLAINTIFF, DERRICK FONTROY'S ANSWER TO DEFENDANT'S REQUEST FOR ADMISSIONS, MEMORANDUM OF LAW, CERTIFICATION OF SERVICE, FILED.

68 MAR 15 (PLFFS) MOTION OF LISA G. MILLER, ESQUIRE, AND THE LAW FIRM OF SIDKOFF, PINCUS & GREEN, P.C. FOR LEAVE TO WITHDRAW THEIR APPEARANCE AS COUNSEL FOR PLAINTIFF, MEMORANDUM OF LAW IN SUPPORT, CERTIFICATE OF SERVICE, FILED.

69 APR 67 (Plffs) memorandum of law; Plffs claims for money damages against prison officials are barred by the Eleventh Amendment to the Constitution, certification of service, filed.

70 " 24 Plaintiff's memorandum of law in opposition to defendants' memorandum on Eleventh Amendment Immunity, certification of service, filed.

71 MAY 2 ORDER THAT DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON PLFFS CLAIM ARISING OUT OF PLAINTIFFS ALLEGED EXPOSURE TO ASBESTORS IS GRANTED AND JUDGMENT IS ENTERED AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANTS (ETC.) PLFFS CLAIM RELATED TO INADEQUATE PRISON SECURITY IS DISMISSED (ETC.) DEFTS MOTION TO DETERMINE THE SUFFICIENCY OF PLFF FONTROYS

ANSWERS TO DEFTS REQUESTS FOR ADMISSIONS IS DENIED AS MOOT, (ETC.). THE MOTION OF COUNSEL FOR PLAINTIFF FOR LEAVE TO WITHDRAW THEIR APPEARANCE IS DENIED AS MOOT, PENDING COMMUNICATION WITH PLAINTIFF REGARDING A POSSIBLE APPEAL OF THIS ORDER, ETC. FILED. 5/2/91 entered and copies mailed.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
DERRICK DALE FONTROY, ET AL
DEFENDANT
DAVID S. OWENS, ET AL
DOCKET NO. 86-4958
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DATE	NR.	PROCEEDINGS
1991		
72 MAY	7	(PLFFS) MOTION TO VACATE JUDGMENT, FILED.
73 "	8	Plffs notice to the Court, filed.
74 "	28	ORDER THAT DEFTS SHALL RESPOND ON OR BEFORE JUNE 17, 1991 TO PLFF'S NOTICE TO THE COURT AND TO PLFF'S MOTION TO VACATE ORDER DATED MAY 2, 1991, BY WHICH SUMMARY JUDGMENT WAS GRANTED AGAINST PLFF. DEFTS SHOULD SPECIFICALLY ADDRESS PLFF'S CONTENTIONS REGARDING THE X-RAY EXAMINATION REFERRED TO IN MAY 2, 1991 ORDER, FILED. 5/29/91 entered and copies mailed.

75 JUN 17 ORDER THAT THE TIME FOR DEFENDANTS RESPONSE TO PLFFS NOTICE TO THE COURT AND TO PLFFS MOTION TO VACATE MY ORDER DATED MAY 2, 1991, BY WHICH I GRANTED SUMMARY JUDGMENT AGAINST PLAINTIFF, IS EXTENDED TO JUNE 24, 1991, FILED. 6/18/91 entered and copies mailed.

76 " 24 Defendants memorandum of law in support of defendant's response to plaintiff's motion to vacate judgment, certification of service, filed.

77 JUL 3 Plaintiff's affidavit, proof of service, filed.

78 AUG 19 ORDER THAT UPON CONSIDERATION OF PLFFS MOTION TO AMEND THE JUDGMENT IT IS ORDERED THAT SAID MOTION IS GRANTED IN PART AND DENIED IN PART. TO EXTENT DEFTS MOTION FOR SUMMARY JUDGMENT ON PLFFS CLAIM ARISING OUT OF PLFFS EXPOSURE TO ASBESTOS, PLFFS MOTION IS GRANTED. THE PORTION OF THE ORDER GRANTING DEFTS MOTION FOR SUMMARY JUDGMENT IS VACATED PENDING A NEW MEDICAL EXAMINATION OF PLAINTIFF. THE SUPT SHOULD ARRANGE FOR AN X-RAY OF PLFF WITHIN 20 DAYS. RESULTS TO PLFFS COUNSEL. PLFFS MOTION IS GRANTED TO EXTENT THAT THE COURTS ORDER DATED 5-1-91 DENIED DEFTS MOTION TO DETERMINE SUFFICIENCY OF PLFFS ANSWERS, ETC. THESE PORTIONS ARE VACATED PENDING NEW MEDICAL EXAM OF PLFF. PLFFS MOTION IS DENIED AS TO THE REMAINDER OF

ORDER, ETC. FILED. 8/20/91 entered and copies mailed.

79 SEPT 9 PLAINTIFF'S MOTION FOR APPOINTMENT OF AN IMPARTIAL MEDICAL EXPERT, CERTIFICATE OF SERVICE., FILED.

80 " 9 MOTION BY PLAINTIFF TO AMEND THE SECOND COMPLAINT, CERTIFICATE OF SERVICE, filed.

81 NOV 20 ORDER THAT THE VACATED PORTIONS OF THE COURTS ORDER DATED MAY 1, 1991, ARE HEREBY REINSTATED. PLFFS MOTION FOR APPOINTMENT OF AN IMPARTIAL MEDICAL EXPERT EXAMINER AND HIS PETITION TO AMEND THE SECOND COMPLAINT ARE HEREBY DENIED. JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFF ON PLFF'S ASBESTORS-RELATED CLAIM. THE COURT REINSTATES THAT PORTION OF THE ORDER DATED MAY 1, 1991, WHICH DENIED AS MOOT DEFTS MOTION TO DETERMINE THE SUFFICIENCY OF PLFFS ANSWERS TO DEFTS REQUESTS FOR ADMISSIONS. THE PORTION OF THE COURTS ORDER DATED MAY 1, 1991, WHICH DENIED AS MOOT PLFFS COUNSELS MOTION FOR LEAVE TO WITHDRAW HER APPEARANCE, IS REINSTATED. PLFFS MOTION FOR APPOINTMENT OF AN IMPARTIAL MEDICAL EXPERT IS DENIED AS MOOT. PLFFS PETITION TO AMEND THE SECOND COMPLAINT IS DENIED, ETC., FILED. 11/21/91 entered and copies mailed.

82 DEC	19	Plffs notice of appeal, filed. (91-2070) 12/19/91 copies: U.S.C.A., O'Neill, J., Coates, Esq., Christopher Campoli, Miller.
83 "	19	Copy of Clerk's notice to U.S.C.A., filed.
– "	20	ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (Pleadings #35,79,80 not included)
1992		
84 JAN	10	Copy of TPO returned, filed.

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF
DERRICK DALE FONTROY, ET AL
DEFENDANT
DAVID S. OWENS, ET AL
DOCKET NO. 86-4958

PAGE ___ OF _____ PAGES

DATE	NR.	PROCEEDINGS
1992		
85 JAN	31	ORDER THAT LISA G. MILLER, ESQUIRE AND THE LAW FIRM OF SIDKOFF, PINCUS & GREEN, P.C., ARE PERMITTED TO WITHDRAW THEIR APPEARANCE AS COUNSEL FOR THE PLFF, FILED. 2/3/92: ENTERED AND COPIES MAILED.
86 "	31	Withdrawal of appearance of Pierre L. Vincent for the deft City of Philadelphia and enter appearance of Leon A. King, II, filed.
87 FEB	4	Withdrawal of appearance of Lisa G. Miller, esquire, and the law firm of Sidkoff,

Pincus & Green, P.C. as counsel for the Plff, in accordance with the Court Order attached hereto as Exhibit A, certificate of service, filed.

88 JUL 27 Certified copy of order from USCA dated 7/24/92 re: order that David Ferleger, Esq. is appointed as counsel to represent appellant Derrick Dale Fontroy, without compensation, in the above civil rights appeal, etc., filed.

89 " 27 Certified copy of order from USCA dated 7/24/92 re: Appellant's motion for appointment of counsel is granted, filed.

1993

90 MAR 18 Defts' Bill of Costs, filed.

91 " 30 Certified copy of Judgement order from the USCA that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant, filed.

– " 30 Record on appeal returned.

92 APR 21 Copy of certified judgement order from USCA with Costs taxed in favor of the appellees in the amount of $258.50, filed.

APPENDIX EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN PROPRIA PERSONAM	:	COMPLAINT
DERRICK FONTROY *et al*	:	Civil Action No. 86-4958
V	:	(Civil Rights)
David S. Owens *et al*	:	(Filed April 28, 1987)

I. JURISDICTION

1. This is a civil action authorized by 42 U.S.C. sec. 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States. The court has jurisdiction under 28 U.S.C. sec. 1343. Plaintiff's seek declaratory relief pursuant to 28 U.S.C. secs. 2201 and 2202.

II. PLAINTIFFS

2. Plaintiff Derrick Fontroy et al, is and was at all times mentioned herein a prisoner of the County of Philadelphia in the custody of the Philadelphia Prison System. He is currently confined in Holmesburg Prison, Philadelphia Pennsylvania.

III. DEFENDANTS

3. Defendant Davis S. Owens, is the Superintendent of the Philadelphia Prison System in the State of Pennsylvania. He is legally responsible [sic] the overall operation of

the Prison System and each institution under its jurisdiction, including Holmesburg Prison.

4. Defendant David S. Owens is the Superintendent of Holmesburg Prison. He is legally responsible for the operation of Holmesburg Prison and for the welfare of all the inmates at that prison.

5. Each defendant is sued individually and in his or her official capacity. At all times mentioned in this complaint each defendant acted under the color of Pennsylvania Law.

IV. FACTS

The Protective Custody Section of Holmesburg Prison (known as D/Rear) is and has been denied their Constitution [sic] Rights as covered by the EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION when it comes to paid jobs, Due Process of Law (Law Clinic Priviledges), [sic] freedom to attend Religious Services, Education and all priviledges [sic] given to the general population of Holmesburg Prison. (see Stipulation and Agreement attached). D/Rear inmates have been denied the things entitled to us under the Jackson V. Hendricks Stipulation.

V. LEGAL CLAIMS

The things we asked for were and are upheld by the United States Supreme Court in NAUDEAU V. HELGEMOE 561 F. 2d 411 (1977) and guaranteed by the

EIGHTH AMENDMENT to the UNITED STATES CONSTITUTION, and the Constitution of the State of Pennsylvania, Constituting Cruel and Unusual Punishment. We further claim, that any and all priviledges [sic] given to the general population and not to D/Rear, is in all respect, [sic] Discrimination.

WHEREFORE, plaintiff respectfully pray [sic] that this court enter judgement granting plaintiffs:

1. A declaratory judgement that the defendants' acts, policies and practices describes [sic] herein violate plaintiff's rights under the United States Constitution.

2. A preliminary and permanent injuction [sic] which:

a) Prohibits the defendant, their sucessors [sic] in office, agents and employees and all other persons in active concert and participation with them from harassing, [sic] threatening, punishing or retaliating in any way against any plaintiff because he filed this action or against any other prisoner because that prisoner submitted affidavits in this case on behalf of the plaintiffs.

b) Prohibits defendant David S. Owens, his sucessor [sic] in office, agent employees and all other persons in active concert and participation with them, from transferring any plaintiff to any other institution without plaintiffs express consent, during the pendency of this action;

c) Requires defendant David S. Owens to remove from each plaintiffs prison files and records any references to any events describe [sic] herein or to the fact plaintiff filed this suit;

d) Requires defendant David S. Owens to remove from each inmates prison files and records any references

to any events described herein or to the fact any D/Rear inmate was involved either directly or indirectly with the filings of this suit and/or signing of affidavits.

e) Prohibits defendant David S. Ownes, [sic] his sucessor [sic] in office, agent employees and all other persons in active concert and participation with them from transferring any resident currently in D/Rear to any other institution without that inmates express consent, during the pendency of this action.

f) Requires defendant David S. Owens, his sucessor [sic] in office, agent employees and all other persons in active concern and participation with them, to allow plaintiffs and other prisoners: 1) to engage in any oral or written communication which is reasonably related to the conduct of this suit, including the preparation of affidavits on behalf of the plaintiff; and 2) to allow plaintiff to confer with co-plaintiffs and prepare legal papers and do anything else, consistent with prison security, which is reasonably connected with the conduct of this suit.

3. Compensatory damages in the amount of 9.9 Trillon [sic] dollars, from defendant David S. Owens, to be equally split between each inmate in D/Rear on the date of this complaint.

4. Punitive damages in the amount of 9.9 trillon [sic] dollars from defendant David S. Owens, to be equally split between each inmate in D/Rear on the date of this complaint.

5. A jury trial on all issues triable by jury.

6. Plaintiff's costs of this suit.

7. Such other and further relief as this court deems just, proper and equitable.

Respectfully submitted,

/s/ Derrick D. Fontroy
Derrick Fontroy
Holmesburg Prison
Section D/Rear
8215 Torresdale Ave
Philadelphia Pa., 19136

In Propria Personam

Date: August 9, 1986

[Caption illegible]

STIPULATION AND AGREEMENT

RE: This letter is in reference to the EXTREME AND UNWARRANTED lose [sic] of privileges of D/Rear inmates (Protective Custody housing area).
The *United States Supreme Court* held in *Nadeau – v. – Helgemoe 561 F.-d. 411* (1977) that P.C. inmates are entitled to everything that the general population is entitled too, the use of the gym, law library, paid jobs, reading library, freedom of religion, the right to attend religious servious, [sic] night yard etc. These things are being denied the P.C. inmates of D/Rear at Holmesburg. The court also held that P.C. inmates not being afforded the same things as the general population, it is a violation of the *Eighth Amendment* of the *United States Constitution* which is

CRUEL AND UNUSUAL PUNISHMENT due to the fact that P.C. inmates are in protective custody because they fear for their lives and/or personal safety or because they can't get along with their fellow inmates in genral [sic] population or for all the aforementioned reasons.

Also please note: D/Rear residents are locked down for the night at 10:30 P.M. One half (1/2) hour before the call for "going down" for general population again in violation of the *Eighth Amendment*.

Attached you will find a certain specified number of violations on the part of prison officials at Holmesburg Prison. These violations are covered under the following cases:

NADRAU - V - HELGEMOE

JACKSON - V - Hendricks

PHILADELPHIA PRISON POLICIES

UNITED STATES CONSTITUTION

Please notice by the signatures attached to this stipulation, the residents of D/Rear feel very strongly are these subjects, and are willing to proceed with legal remedies if need be. This is not meant to be taken as a threat, but as an act to secure and insure what we are guaranteed under the law.

JOBS

We, as residents of D/Rear have been denied the priviledge [sic] of paying jobs within the prisons. This is done under the premise of our being in protective custody.

This is a bunch of bull. We are being punished by the prison because we require protective custody. There are jobs around the prison we can do when the rest of the population is locked down, i.e. 6:00 P.M. count, after the final count of the night, or before the prison is opened for the morning activities. These jobs could include: cleaning of center, office duties, or any other type of job that is available when the rest of population is out of lock-up. We are currently used for cleaning, mopping of D/Block, cleaning of showers, telephone monitors, etc., all without pay. The only benefit we receive for our labors is an extra 10 minutes on the telephone more than those would, who don't work. It is realized that there are not enough jobs for every inmate on D/Rear, further we realize that not every resident of D/Rear will want to work, but work should be made available to any resident that wants work. This work should be compensated with case placed on the inmates books, and not with an extra priviledge [sic] such as phone time, or an occasional bag of TOP that is currently given. The following is just a small sample of jobs that could be provided to D/Rear residents:

1. Sweeping of the Hospital area, Center, C and F rears, Visiting area Annex etc.
2. Mopping of the above mentioned areas
3. Exterminating the above mentioned areas
4. Office Work in Receiving, Center, Hospital and Annex
5. Laundry
6. Cleaning of Shops
7. Kitchen duties

I don't feel it's asking too much, to ask to be treated with a little human dignity. The majority of us, are not in D/Rear because we want to be, but because we have to be. This should not be used against us, when it comes to the benefit of working. Nor should we be asked to do for free, what those in population get paid for. This is a clear case of DISCRIMINATION on the part of prison officials, which will (if we have to) be upheld in any court of law.

SECURITY

Proctective [sic] Custody means, we are to be separated from the rest of the jail, either because our lives are in danger or because we are physically unable to function in population, ie. BROKEN LEGS, SEIZURES etc., (not including mental disorders).

However this is not the case, there are more people in D/Rear with white arm bands than red arm bands. Inmates are placed back here merely because there is no room in the rest of the jail. Even State prisoners are placed back here because there is no room on D/Front. This defeats the entire purpose of D/Rear. Those inmates who for disiplinary [sic] reasons were placed either on C or F rears usually end up on D/Rear before going back to population. THIS PRACTICE MUST STOP, for the safety of those inmates legitimately in D/Rear. (Today 7-27-86 there are 58 residents housed on D/Rear as of 10:15 P.M.).

D/Rear residents are constantly the target of thiefs, extortion attempts, threats, etc., especially by State Prisoners on D/Front, who somehow manage to get past the so called "SECURITY GATE". One way to stop this practice would be to move the entire "Protective Custody" area to

a smaller block, where the entire block would be P.C. such as "H" Block. This would eliminate any contact with the State Prisoners. At this point right now, D/Rear residents have to walk thru D/Front to go to any other area, such as medication, sick call etc., where we are left wide open to be jumped, threatened, have commissary bags stolen right out of your hands etc.

One (1) escort officer can take all the inmates from D/Rear to the hospital and at one time and return them to their respective housing areas. As for my own safety, I hold the entire Prison Administration personally responsible. If I am attacked, or hurt in anyway [sic] because of the neglect or lack of proper security, I will not hesitate to file a lawsuit against the entire administration and its personnell [sic] responsible for the safety of the inmates, in an amount not less than the National Debt and will request an investigation by the State Board of Prisons, News Media and local City Officials.

I realize this may seem like a joke, but I promise you this is not a joke to the residents of D/Rear. Its a genuine concern. It's up to Prison Officals [sic] to insure our safety without taking away priviledges [sic], and rights granted to the rest of population and/or those of a human being.

I would like to remind you of the philosophy of the PHILADELPHIA PRISONS as stated in the "RESIDENTS HANDBOOK". "WE RECOGNIZE THE IMPORTANCE OF PROVIDING HUMANE TREATMENT IN THE CONTEXT OF A WILLINGNESS TO LEARN AND CHANGE, FURTHER WE EMPHASIZE THE NEED FOR A SECURE

ENVIRONMENT WHILE AFFIRMING THE DIGNITIES AND RIGHTS OF INDIVIDUALS".

I would also like to quote the first two (2) paragraphs of the "Preface" of the Residents Handbook.

"PERSONS ENTERING THIS INSTITUTION ARE CITIZENS UNDER RESTRAINT, THEY HAVE LOST NO RIGHTS OR PRIVILEDGES [sic], EXCEPT THOSE THAT MUST GIVE WAY TO THE SAFETY AND SECURITY OF OTHER PRISONERS, JAIL PERSONAL [sic], AND THE COMMUNITY".

"DURING YOUR STAY, YOU ARE ENTITLED TO BE TREATED AS A HUMAN BEING. YOU ARE ENTITLED TO CLEAN SURROUNDINGS, TO A WHOLESOME QUANTITY OF FOOD AND TO THE OPPORTUNITIES FOR RECREATION AND CONSTRUCTIVE ACTIVITIES".

THATS ALL WE ARE ASKING.

I have personally had my cell ripped of [sic] 5 times in six (6) months and have been the target of an extortion attempt. On Tuesday June 17, 1986, I personally witnessed an attempt to grab a bag out of the hands of an inmate of D/Rear, returning from the Commissary by a resident of D/Front.

This is only part of the Security problem, that is the responsibility of the Philadelphia Prison system. Being so close to the State Prisoners, they get to know our faces and charges. Those of us who are later convicted and given state time, later on, continue to be the targets, when we are shipped up state to one institution of [sic] another. This again falls back on the poor sucurity [sic] at

Holmeburg [sic]. The officials at Holmesburg, seem to have forgotten, most of us are only here because we cannot afford to make bail. We have for the most part *not* been convicted of any crimes as of yet. But we are still treated worse than 2nd class citizens, where as those who have been convicted have been, and are presently treated as 1st class citizens. It seems as far as this prison is concerned CRIME DOES IN DEED PAY.

There are also not enough C/O's on D/Rear. There should be two (2) C/O's on duty from 7:00 A.M. to 11:00 P.M. One evening approximately 8 weeks ago, an inmate named "Smokey" just went crazy and attacked C/O Ross. Both guards from D/Front were up by their head-gate, and it was left up to the residents of D/Rear to secure the area, stop the attacker and detain him. Approximated five (5) minutes lapsed before one of the C/O's from D/Front came back to D/Rear. There are quite a few inmates back in D/Rear, who are afraid to go to "SICK-CALL." and "MEDICATION" because after 3:00 P.M. thee are no escort officers available. From the medication room, your [sic] on your own to go to the hospital area and to return to your housing area. This is true for visits, picking up packages and legal mail. If extra C/O's are not available or cannot be hired due to the lack of appropiations, [sic] than [sic] medication, packages and offical [sic] mail should be then delivered directly to D/Rear and distributed accordingly. Center guards can escort inmates with visiting passes. sick-call can be handled just like C and F rears.

TELEPHONES and TELEVISIONS

D/Front has exactly 40 cells in its area, giving them the capacity of holding 80 prisoners. They currently enjoy the priviledge of having two (2) direct phone lines and three (3) collect telephones. D/Rear has 36 cells giving us the capacity of holding 72 prisoners, thats only 8 less than D/Front and we only have one (1) direct telephone and two (2) collect telephones. We would like to see two (2) direct phone lines in D/Rear along with our current two (2) collect telephones. The same goes with televisions D/Front has two (2) while D/Rear only has one (1). We would also like to see a second television in D/Rear.

EDUCATION

INMATES RIGHTS TO EDUCATION

I feel that education is a right, and not a priviledge every inmate is entitled to under the *UNITED STATES CONSTITUTION*. This right should not be violated just because we are in protective custody.

Education could be the tool, some of us to to [sic] get out, and stay out of jail. By increasing the level of our education, we will be able to obtain and retain better jobs on the outside.

By providing educational opportunities to the inmates including the residents of D/Rear, minds would be more occupied, decreasing the possibility of inmate involvement in undesirible [sic] activities. When ones mind is occupied he is less likely to contemplate ideas of fighting, thieft [sic] and other illegal activities. The following is a list of educational services currently available in this

institution, however they were currently denied the residents of D/Rear.

1.- Pennypack School (G.E.D. Program)

2.- Catholic Social Services (Pre-G.E.D. program and Reading illiteracy program)

3.- O.A.R. Edectics (misc. studies and workshops)

LAW LIBRARY

You must take into serious consideration the policies governing the inmates housed in D/Rear. Because these policies are seriously violating our due process of the law, by limiting our access to legal material. It is a well known fact, that at times the most we get in the law library is a half (1/2) hour. There is no way any person can get anything done in that short of a time span. We must have more time in the Law Library. We must have more time to prepare our legal work.

In addition the material currently stocked in the Law Library is grossly inadequate. There are many times when a book is requested, that should be available, but is not part of our Law Library's inventory. Many of the books, and materials that are available are out-dated and/or obsolete. Many times, photocopies are required, and for various reasons we are unable to obtain these photocopies. The excuses given are: the machine is broke, no paper, or that too many copies are required.

Understand that these things we're requesting of this institution are not in anyway asking for extra favors or additional priviledges [sic]. What I'm asking for is what every inmate in the county jail has a legal right to.

RELIGIOUS PRACTICES AND SERVICES

We in D/Rear are currently being denied the right to practice our religious beliefs for the most part. We are constantly given excuse [sic] as to why we can not attend a religious services such as: No escort offices are available, services are running late, services haven't been announced yet, etc. What it really amounts to, is an attitude on the part of the C/O's that the residents in D/Rear are not entitled to anything and that any excuse that they can use, is used to insure we don't get what we are entitled too [sic]. For example over the past year and a half, several of the D/Rear residents have requested that they be allowed to attend Protestant religious services. After almost nine (9) months, a procedure was finally set up that was supposed to allow us to go to one religious service or another on a Sunday morning.

Firstly by allowing us to attending one service a week, but still denying us all the other services and Bible studies doesn't even come close to "the same" services provided for general population.

Secondly, even that one service a week is often denied, because of a variety of excuses. Again no escort C/O's, services running late, etc.

Another example is in the area of Thereputic [sic] services (creative arts and psychological counseling). As a result of the efforts of some of the social workers from Hannaman unit, some of the inmates have attempted to participate in "music therapy". In spite of their efforts over the past sereral [sic] months, these inmates have been unable to get to their scheduled sessions more than 50% of the

time. Reason being again "No escort officer available", etc., or if he is available, he is running so late, that we only get about fifteen (15) minutes of our scheduled session.

It is our understanding that P.C. inmates are entitled to the same Religious and Theraputic [sic] services as the rest of the population of the Jail. While there may be some differences, due to the requirements of security, the actual fact, not once was "security!" used as an excuse to deny us access to these services.

READING LIBRARY

We have been denied total access to the reading library, located in the Chapel area, right next door to the Law Library. This Reading Library can be opened to us during 6:00 P.M. count, on a nightly basis.

JACKSON v. HENDRICKS

The following was specified in the case Jackson vs. Hendricks which currently is not in practice at Holmesburg.

It states inmates may wear jewelry, ie, watches, rings, etc., however we are only allowed to wear wedding rings and religious articles.

It states commissary prices are not to exceed cost plus 5%. However commissary prices exceed the prices in outside stores.

It states extermination for all rodents and bugs will be done. We are lucky to get the exterminator in D/Rear

once a month, to spray an ineffective chemical for bugs, never does he bait for mice, rates etc. Calls such as #441 and 442 have pipes from the plumbing leading to the cells where the mice have nested around. Calls #448 and 457 have broken windows allowing all types of additional insects and weather inside.

It states each cell is to be provided with some type of locked contained [sic] with a tight fitting lid for keeping of food stuffs etc. No cell is so equipped. It states we are to be given a choice of a hot or cold vererage [sic] with meals, tea bags are to be made available, a mechanism is to be provided to make hot water available for detainees during or meals. None of this exists. It states there is to be a variety in foods served – It's the same weekly. It states condiments are to be available with all meals – we see something maybe twice a month. Nor does anyone ever check the reaction to the food services program as far as plate waste is concerned.

We have bad residents refused permission to attend funerals of immediate family members.

We are supposed to be guaranteed one (1) daily call each on the direct phones.

There is not enough hours in one day to provide each person with a phone call on the direct phone due to the over population of D/Rear and due to the fact we only have one direct telephone.

FOOD CARE AND MEAL PREPARATION

We in D/Rear are quite concerned with the way our meals are being delivered. A lot of the food is taken off

the truck, before it ever gets to D/Rear. Whether its being sold or stolen is not the point, the point is we're not getting it. Also the food car is suppose to be able to keep food hot to a certain temperature and cold to a certain temperature. The cart sent to us on a daily basis does neither.

Also we object, to the fact that someone other than a D/Rear resident go to the kitchen for our food. Again we are in protective custody for a reason. If someone decided to poison the food to get to somebody in D/Rear, we would all be poisoned. This is just an error in common sense on the prisons part. We are neither supplied with sugar, salt, pepper, kethcup [sic], mustard etc., except on rare occassion. [sic] Other items we are force to buy it from someone in population. It is also very rare, when the beverage that comes back with the truck, has any ice in it. We also object to the use of artificial sweetners [sic] used and the mixtures of different juices together.

Tabacco [sic] Products

Be in known in D/Rear only those who do not go to the commissary are receiving "TOP". this is an unfair practice. Everyone should be receiving a pack of Top. Currently it is given to all state prisoners in D/Front.

At the commissary, we are currently only allowed to buy thirteen (13) packs of cigarettes. We feel this is not enough. We are asking to have the amounts we are able to buy be raised to meet the levels currently used at the Detention Center, which is 20 packs of national brand cigarettes and an additional 20 packs of the generic brand.

General Conditions Of D/Rear

The general overall condition of D/Rear is horrible. [Illegible] the walls, both inside of the cells and on the block itself. This despite an all out effort on the part of D/Rear residents to scrub them and get them at clean as possible. The ceiling is almost black. Paint is blistered badly inside of the cells. If provided with the paint and the necessary materials, we are willing to do the painting ourselves. As long as we are properly compensated. Ventillation [sic] in the cells is poor, at best. The blower system meeds desparately [sic] to be cleaned. Radiators only work on one side of the block.

Even worse is the fact, we are completely surrounded by ASBESTOS. Under the law this was to be removed sometime ago, as it is a known CANCER causing agent.

Finally please note, that we are only asking for what the law says is already suppose to be ours. We are requesting that Holmesburg officials bring themselves in line with the law. We are not making any unnecessary nor unwarranted requests. We are asking only for what we are already supposed to be receiving. We feel very strongly about this, and we (D/REAR) as a whole, if the need arises, are ready to take this to court. This is not meant to be taken as a threat, but in turn is not to be taken lightly. As we're sure you already realize, Holmesburg is in gross violation of our civil rights. We demand that no retaliation be taken against any D/Rear resident on the part of

prison officials or C/O's because of our decision to exercise our rights.

Amos Gadson
Block Representitive

/s/ Derrick Fontroy
Derrick Fontroy
Asst. Block Representitive

443	Joseph A. Pepe	85-15287
444	Anthony Bagni	85-06672
445	Donal Mason	85-10239
446	James Dykes	84-09472
446	William Moore	85-04346
447	Frank Jordan	86-07124
447	John P. Huttick	86-08239
448	Moses Cordero	86-04752
448	Joan Espiet	86-09129
449	William Fenton	86-02854
449	Rumilio Torres	86-11496
450	K. Smith	85-16284
450	John Carter	86-02097
451	Thilbert Louis	85-18076
451	Louis Seykes	86-03420
452	Francis Kelly	86-07206
452	Mark V. Hofman	85-05215

[Illegible]

[Illegible]

456	Tod Foy	85-19053
459	Henry Elrod	84-19462
459	Alonza Gadsona	A-4514
460	Leroy Warryta	85-14345
460	Calin Carter	8408432
462	Janis McCloud	

463	Amos J. Gadson	8506499	Amos Gadson
466	William Ross	8605590	DI
466	James William		DI

[Illegible]

[Illegible]

472	Robert Clark	86-4775	Robert Clark
472	Dwayne Dowling	A-4460-	Dwayne Dowling
474	Elmer Redonan	86-03363	Elmer Redonan
475	Luory Davis	86-07264	Luory Davis
476	Steven Thompson	85-09900	Steven Thompson
477	Jimmy Goodson	84-17964	Jimmy Goodson
477	Dwayne Smith		Dwayne Smith 86-04883

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY et al	:	AFFIDAVIT
V.	:	
	:	Civil Action
DAVID S. OWNES et al	:	No. ___
	:	

VERIFICATION

We the undersigned, being duly sworn, depose and say, that they reside in the D/Rear section of Holmesburg Prison in Philadelphia, Pa.; and that they have read the foregoing complaint and know the contents thereof and that the same are true of their own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters they believe them to be true. Under the penalty of perjury.

NAME	INMATE NUMBER	SIGNATURE
William Fenton	86-02854	William Fenton
Frank Jordan	86-07124	Frank Jordan
Rick Ramsey	8518495	Rick Ramsey
Albert Rosati	86-08914	Albert Rosati
Anthony Lindsay	86-02143	Anthony Lindsay
Francis W. Kelly	86-07206	Francis W. Kelly
John P. Huttick	86-08239	John P. Huttick
Issac Morris	86-A4667	Issac Morris
Joaquin J. Foy	85-19053	Joaquin J. Foy

Juan Van Tren	84-1461	Juan Van Tren
Glenn M. Wallace	85-11363	Glenn M. Wallace
Marvin K. Spence	86-11980	Marvin K. Spence
Joseph Anthony Pepe	85-15287	Joseph Anthony Pepe
William Ross	8605590	William Ross
LeRoy B. Warryton	85-14349	LeRoy B. Warryton
Alfonso Robbins Africa	86-11728	Alfonso Robbins Africa
Pantelu Pantemu	85-16672	Pantelu Pantemu
Robert Clark	86-04775	Robert Clark
Lewis Sykes	86-13420	Lewis Sykes
Donald Brown	A-4504	Donald B.
Thomas Abraham	84-12589	Thomas Abraham
Rumilie Torres	86-11498	Rumilie Torres
Raymond Gibbs	86-02863	Raymond Gibbs
James McCloud	86-03404	James McCloud
Elmer Redman	84-4969	Elmer Redman
Henry Elrod	84-19462	Henry Elrod
William Moore	85-04346	William Moore
James Dykes	84-08472	James Dykes
Duane Smith	86-04883	Duane Smith
[Illegible]		
Vince R. Williams	8601468	Vince R. Williams
Alonzo Gadson	A4514	Alonzo Gadson
Thelbert Lewis	8518076	Thelbert Lewis

Audra Bruce Mathis Sr.	85-11611	Audra B. Mathis Sr.
John Dennis Carter	86-02092	John Dennis Carter
Paul Satterfield	84-06808	Paul Satterfield
Nathaniel Nelson	86-09317	Nathaniel Nelson
Edward Ferris	85-13333	Edward Ferris
[Illegible]		
Mack V. Hofman	85-05215	Mack V. Hofman
[Illegible]		
Anthony James	A-4767	Anthony James
James Williams	86-08-128	James Williams
Derrick Fontroy	84-14074	Derrick Fontroy
Amos Gadson	85-06499	Amos Gadson
Anthony Bagni	85-06672	Anthony Bagni
Moses Cordero	86-04752	Moses Cordero

APPENDIX EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY, et al. CIVIL ACTION

v.

DAVID S. OWENS, et al. NO. 86-4958

MEMORANDUM

O'NEILL, J. APRIL 28, 1987

In this *pro se* 42 U.S. § 1983 civil rights action, plaintiff Fontroy, an inmate in the protective custody unit at Holmesburg prison, raises numerous allegations regarding the conditions of his confinement in the protective custody unit (hereinafter "PCU"). Specifically, he charges that PCU inmates are denied paying jobs; placed at risk due to the shortage of correctional officers and the practice of housing state inmates in PCU; and deprived adequate telephone service, television viewing, educational opportunities, access to the courts, religious services and admittance to the general reading library. He further complains that the prison is in violation of the Court's order in *Jackson v. Hendrick*[1] as a result of its practices governing commissary pricing, bug extermination, and food service. Lastly, he objects to the distribution of tobacco products and the condition of the PCU cells.

His claims relating to employment, telephone access, television, educational and rehabilitational programs, access to general library, *Jackson v. Hendrick*, and tobacco products are dismissed as frivolous as is more fully set forth below. The action may proceed on the remaining

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[1] See infra, note 2.

allegations regarding security, access to the courts, religious services and cell conditions.

With his complaint, plaintiff filed a request for leave to proceed *in forma pauperis*. As it appears he is unable to pay the cost of commencing this action, leave to proceed *in forma pauperis* is granted.

EMPLOYMENT

An inmate has no constitutional right to a job of his choice, *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984). Nor is there a federal or constitutional guarantee that an inmate be paid for his work. The amount of his compensation, if any, is within the discretion of the prison administration. *White v. Sullivan*, 368 F. Supp. 292, 295 (S.D. Ala. 1973). Fontroy's claim that protective custody inmates are denied the privilege of paying jobs is dismissed as frivolous under 28 U.S.C § 1915(d).

TELEVISION

Fontroy's claim relating to the denial of a television is not a cognizable § 1983 claim as it does not pertain to a federal constitutional or statutory right. *Montana v. Commissioners Court*, 659 F.2d 19, 23 (5th Cir. 1981), citing *Lovern v. Coe*, 374 F. Sup. [sic] 32, 34 (W.D. Va. 1974).

TELEPHONE

Plaintiff has a First Amendment right to reasonable access to the telephone. *Johnson v. Galli*, 596 F. Supp. 135, 138 (D.Nev. 1984); *Inmates of Allegheny County Jail v. Wecht*, 565 F. Supp. 1273, 1283 (E.D. Pa. 1983). Fontroy

states that PCU inmates have one (1) direct and two (2) collect telephone lines. He further states that, given the population of PCU, PCC inmates are not assured a daily call on the direct telephone line. Nevertheless, the facts alleged do not suggest an unreasonable infringement of the inmates' right to access to a telephone. The claim is dismissed as frivolous.

EDUCATIONAL AND REHABILITATIONAL PROGRAMS

The control of prison educational and rehabilitational programs is a matter of prison administration and does not rise to the level of a federal claim in most instances. *Hayes v. Cuyler*, 475 F. Supp. 1347, 1350 (E.D. Pa. 1979). Fontroy alleges that PCU inmates are not allowed to attend the educational and rehabilitational programs available to and attended by prisoners in the general population. However, his claim of discrimination fails because PCU inmates are not similarly situated to the inmates in the general population. PCU inmates, as explained by Fontroy in his complaint, are separated from the rest of the prison population because their lives are in danger or because they are unable to function in the general population. Fontroy fails to state an equal protection claim; the claim is dismissed as frivolous under 28 U.S.C. § 1915(d).

JACKSON v. HENDRICK

Plaintiff claims that the prison is in violation of the Order in *Jackson v. Hendrick* governing commissary pricing, food service and bug extermination. Because I cannot

verify the requirements allegedly established in *Jackson*, I dismiss the claim as frivolous under 28 U.S.C. § 1915(d).[2] Leaving aside the *Jackson* standards, I also dismiss the claim as frivolous because plaintiff's factual allegations concerning conditions at Holmesburg do not state a constitutional violation. *Cf. Owens-El v. Robinson*, 442 F. Supp. 1368 (W.D. Pa. 1978), *aff'd in part, vacated in part, Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754 (3d Cir. 1979).

TOBACCO

The Constitution does not guarantee anyone the right to smoke cigarettes. However, state law may create a right of which defendants may not deprive plaintiff without due process. *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Fontroy complains that PCU inmates are currently being denied "Top" and are only allowed to purchase thirteen (13) packs of cigarettes. Section 123 of Title 61 of the Pennsylvania Statutes Annotated provides that an inmate may not be deprived of tobacco for more than two

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[2] Plaintiff gives no citation for this case. However, plaintiff may be relying upon *Jackson v. Hendrick*, ___ Pa. ___, 503 A.2d 400 (1986), a case concerning conditions in the Philadelphia prison system. Assuming that this is the case upon which plaintiff relies, and assuming further (without deciding) that plaintiff has standing to enforce the Court Order involved in *Jackson*, he should seek enforcement of the Order with the court that entered it. It would violate the principles of comity for this Court to interpret and enforce the provisions of a decree entered by a Pennsylvania state court. *Wade v. Owens*, No. 4618, slip op. at 5, n. 1 (E.D. Pa. April 16, 1986).

weeks. It appears from the allegations of plaintiff's complaint that he has not been denied tobacco for more than two weeks. The claim is dismissed as frivolous under 28 U.S.C. § 1915(d).

CONCLUSION

The claims discussed above are dismissed as frivolous pursuant to 28 U.S.C. § 1915(d). The action may proceed on the remaining claims regarding security, court access, religious services and cell conditions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY, et al. CIVIL ACTION

v.

DAVID S. OWENS, et al. NO. 86-4958

ORDER

(Filed April 28, 1987)

AND NOW, this 28th day of April, 1987, pursuant to the attached Memorandum and Order,

IT IS ORDERED that:

1. Leave to proceed *in forma pauperis* is GRANTED.

2. Plaintiff's claims relating to employment, telephone access, television viewing, educational and rehabilitational programs, admittance to the general library, *Jackson v. Hendrick*, and tobacco products are dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

3. The remaining allegations of the Complaint regarding security, access to courts, religious services and cell conditions are to be filed, the summons is to issue, service is to be made upon defendant(s), and a copy of this Order is to be directed to plaintiff.

4. All original pleadings and other papers submitted for consideration to the Court in this case are to be filed with the Clerk of this Court. Copies of papers filed in this court are to be served upon counsel for all other parties (or directly on any party acting *pro se*). Service may be by mail. Proof that service has been made is

provided by a certificate of service. This certificate should be filed in the case along with the original papers and should show the day and manner of service. An example of a certificate of service by mail follows:

> "I, (name), do hereby certify that a true and correct copy of the foregoing (name of pleading or other paper) has been served upon the (name(s) of person(s) served) by placing the same in the U.S. Mail, properly addressed, this (date) day of (month) (year).
>
> _____
>
> (Signature)"

If any pleading or other paper submitted for filing does not include a certificate of service upon the opposing party or counsel for opposing party, it may be disregarded by the Court.

5. Any request for court action shall be set forth in a motion, properly filed and served. The parties shall file all motions and all papers relating to motions, including proof of service upon opposing parties, with the Clerk of the Court. All other requirements of the Federal Rules of Civil Procedure and Local Rules are to be followed.

6. No direct communication is to take place with the District Judge or United States Magistrate with regard to this case. All relevant information and papers are to be directed to the Clerk.

7. In the event the summons is returned unexecuted, it is plaintiff's responsibility to ask the Clerk of the Court to issue an alias summons and to provide the Clerk with defendant's correct address, so service can be made.

8. The parties should notify the Clerk's Office when there is an address change. Failure to do so could result in court orders or other information not being timely delivered, which could affect the parties' legal rights.

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

4/28/87 – cc: D. Fontroy

APPENDIX EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Derrick Dale Fontroy I, et. al. Civil. Action.

v.

David S. Owens et. al. No. 86-4958

AMENDED COMPLAINT

(Filed June 9, 1987)

TO the Honorable Judge, of the above said court:

Come Now, Derrick Fontroy et. al. And Plaintiffs in the above cause of action, who represent the folling [sic]:

Inmates in protective custody in maximum security at helmesburg prison in Philadelphia Pennsylvania are being denied rights retained under the first, fifth, eighth, and fourteenth amendment. The Equal Protection Clave [sic] gaves Protective Custody Inmates a Constitutionally Protected Liberty Interest in prison jobs and Educational and Vocational Programs Equivalent to those afforded other inmates except to the extent of a demonstrated rational relationship between any difference in treatment and a legitimate state interest, of which there has been none shown. Prison officials cannot condition Protective Custody status that is predicated on danger to the safety of an inmate upon the forced surrender of these Liberty Interests, the court will observe. The officials in this case have forfeited their right to the Deferense [sic] they normally receive from the court by attaching the security Label so indiscriminately and in a unwarranted manner.

JOBS

We, as resident of D/rear are being denied Jobs; and the priviledge [sic] of paying Jobs within the prison. This is done under the premise of our being in protective custody, we are being punished by the prison because we require protective custody. There are Jobs around the prison Plaintiffs can do when therest [sic] of the population is locked down, i.e. 6:00 Pm. count, after the final count of the night or before the prison is opened for the morning activities. These Jobs could include: Cleaning of center, office duties, or any other type of Jobs that is available when the rest of population is out of lockup. We are currently up for cleaning mopping of D/rear, cleaning of showers, telephones monitors, ect [sic]; all without pay

The only benefit we receive for our labors is an extra (10) minutes on the telephone more then those would, who don't work, but population inmates get pay for there [sic] labors, it is realized that these are not enough Jobs for every inmate in D/rear, further we realize that not every resident of D/rear will want to work, but work should be made available to any resident that wants that work. This work should be compensated with cash placed on the inmates account, and not with an extra priviledge such as phone time, or an occasional bag of top that is currently given. The following is just as small sample of Jobs that could be provided to D/rear residents:

1. Sweeping of the hospital area, center, C. and F. rear, Visiting area annex ect. [sic]

2. Mopping of the above mentioned areas.

3. Extermination the above mentioned areas.

4. Office work in receiving, center, hospital and annex.

5. Laundry.

6. Clean of shops.

7. Kitchen duties.

I don't feel it's asking to [sic] much, to ask to to be treated with a little human dignity. The majority of us, are not in D/rear because we want to be, but because we have to be this should not be used against us, when it comes to the benefit of working because this only show discrimination.

TELEPHONE and TELEVISION

The Plaintiffs has a first and fourteenth amendment right to have reasonable access to the telephone and television, this has caused an unreasonable infringement of the inmates of D/rear rights to a telephone and television, because D/rear has exactly (40) cells in it's area, giving them the capacity of holding (80) prisoners they currently enjoy the priviledge [sic] of having two (2) direct phone lines and three (3) collect telephone. D/rear has (36) cells giving us the capacity of holding (72) prisoners, thats only (8) less then D/Front and we only have one (1) direct telephone and two (2) collect telephones. It would only be fair if D/rear has two (2) direct phone lines and our current two (2) collect telephones and the same goes for the television D/front has two (200) while D/rear only has one (1).

EDUCATION

We feel that education is a right, an [sic] not a privledge [sic] every inmate in D/rear is entitled to under the equal protection of the law of the fourteenth amendment of the united states constitution. This right should not be violatied [sic] just because we are in protective coustody [sic] education could be a tool to some of us to get out, and stay out of jail. By increasing the level of our education, we will be able to obtain and retain better Jobs on the outside. By providing educational opportunities to the inmates including the residents of D/rear, mines [sic] would be more occupied, decreasing the possibility of inmate involvement in undesirible [sic] activities. When one mind is occupied he is less likely to contemplate ideas of fighting thieft [sic] and other illegal activities. The following is a list of educational services currently denied to the residents of D/rear.

1. Pennypack school services (pre G.E.D. program).

2. Catholic Social Services (pre G.E.D. program and reading illiteracy program)

3. O.A.R. edectics [sic] (misc. studies and workshop).

READING LIBRARY

Plaintiffs of D/rear has a first and fourteenth amendment right to the reading library we have been denied total access to the reading library, located, in the chapel area, right next door to the law library this reading library can be opened to the inmates of D/rear during 6:00 P.M. count, on a nightly basis when the rest of the jail is lock up.

BUG EXTERMINATION

The Plaintiffs claim that the prison is in violation of the Eight and the Fourteenth amendment Governing Commissary Pricing, Food Service, and bug extermination. See: Complaint.

Date 6-8-87

/s/ Derrick D. Fontroy
Derrick Dale Fontroy
P.O. Box 244-1-7513
Graterford, Pa. 19426

PROOF OF SERVICE

I, Derrick Dale Fontroy, hereby certify that a true and correct copy of the annexed motion has been served upon the Defendant's Counsel, Frederick M. Walton, Jr. Assistant City Solicitor At 1101 Market Street, 9th Floor Philadelphia Pennsylvania 19107-2996. By placing same in the United States Mail Properly Addressed;

THIS 6 day of June, 1987

/s/ Derrick Dale Fontroy
Derrick Dale Fontroy
P.O. Box 244-7513
Graterford, Pa. 19426

APPENDIX EXHIBIT 5

CITY OF PHILADELPHIA
DEPARTMENT OF HUMAN SERVICES
PHILADELPHIA PRISONS

OFFICE OF SUPERINTENDENT OF PRISONS
8201 State Road, Philadelphia, Pennsylvania 19136
(215) 335-8201

August 6, 1986

Residents of D Rear
Holmesburg Prison
8215 Torresdale Avenue
Philadelphia, Pa. 19136

Gentlemen:

I have reviewed your communications to me of August 5th, 1986, and I, personally, toured your housing unit.

I believe that there is a difference of opinion with regard to what individuals in protective custody in the Philadelphia Prisons are entitled to. This is quite understandable.

I am certain that we will have, from time to time, different points of view. However, I sincerely hope that our commitment to human dignity is never questioned.

Due to the nature of your situation, it is necessary that certain privileges that individuals in general population have will not be available to you. Our primary purpose in

protective custody is to protect the safety of those individuals being held in this classification. Therefore, if certain privileges that you may have in general population are not available to you, I ask you to be understanding.

There must be a reasonable position that takes into account the needs of the individuals in special custody situations, such as protective custody, and the needs of individuals held in general population, and, finally, the needs of the institution as a whole. We are quite willing to do all within our ability to find this reasonable position.

I have reviewed State standards and the most recent court cases in this regard. I think that the minimal standards, as set forth in our procedures meet those standards.

I suppose the fundamental difference between us is that you are under the impression that all of the programs that are available to the general population should be available to those in protective custody. That is not the case, as I understand it. The court has taken into account, on numerous occasions, the uniqueness of protective custody. I would urge you to review the law again to make sure there is no misunderstanding.

At my earliest opportunity, I will try to arrange a meeting with the individuals in your housing area so that we may discuss the issue further.

Sincerely yours,

/s/ David S. Owens, Jr.
DAVID S. OWENS, JR.
Superintendent

DSO/aer

cc: Gaetano Curione, Warden, Holmesburg Prison
John Frank, Lieutenant

CITY OF PHILADELPHIA
DEPARTMENT OF HUMAN SERVICES
PHILADELPHIA PRISONS

OFFICE OF SUPERINTENDENT OF PRISONS
8201 State Road, Philadelphia, Pennsylvania 19136
(215) 335-8201

August 26, 1986

Amos Gadson, No. 85-06499
William Fenton, No. 86-02854
Leroy Warrington, No. 85-14349
Holmesburg Prison
8215 Torresdale Avenue
Philadelphia, Pa. 19136

Dear Messrs. Gadson, Fenton, Warrington:

Thank you for your memorandum of August 22, 1986.

I must confess to you, at this point and time, that I am very confused. As you are aware, you have called several matters to my attention via memorandums. I have discussed these things with the Warden and Deputy Warden of your institution and have asked them to look into your

concerns, and if it does not violate any rules and regulations, and if it is within their ability to do so, that they should do what they can to assist.

I have recently been advised by Mr. Fontroy that the issues that you raised in your original communications are now the subject of litigation in the Federal Court.

When I was advised of that, it was my position that our attorneys should discuss the issues and try to resolve them.

It is my position that the Philadelphia Prisons have violated no laws or acceptable standards with regard to the treatment of protective custody of residents.

It is also my view that we should do what we can to assist when possible.

I am now asking for clarification: Are these issues the subject of litigation, or are they not?

I will immediately forward a copy of your memorandum to Warden Curione and ask him to investigate the issues that you raised and report back to me.

Sincerely yours,

/s/ David S. Owens, Jr.
DAVID S. OWENS, JR.
Superintendent

DSO/aer

cc: Gaetano Curione, Warden, Holmesburg Prison
Edward A. Aguilar, Prison Master
Charles Freeman, Pennsylvania Prison Society
Frank Kent, A. C. L. U.

August 30, 1986

TO: David S. Owens

RE: Your Memorandum of August 26, 1986

First off, please accept our apology, for any confusion caused by our memorandum to you concerning the Security Problems on D/Rear (Protective Custody Housing Unit).

You are correct, that Mr. Derrick Fontroy has raised this issue, along with many others, and they will be the subject of litigation in the Federal Courts. However it is not our intent to confuse the issues, but to clarify them and to keep you informed of on going problems, within the system.

As we are sure you are aware, Mr. Fontroy, has been transferred out of Holmesburg Prison, possibly out of the Philadelphia Prison System. This transfer took place on Monday August 18, 1986, to where or why, we do not know. Nor do we know if he is to be returned to Holmesburg Prison.

We will, continue to keep your office informed of future and on going problems, along with letting you know when something is no longer a problem whether it was resolved or just no longer exists. If and when we can resolve a problem within the system, whether it be with Prison Administration or Correctional Officers, we are more than happy to do so.

We also feel that the issues now subject to litigation, should be decided by the Court's [sic] according to Law, Supreme Court Rulings and the United States Constitution. We are sure, you share our feeling in this matter.

We hope to be able to continue to have and enjoy a working relationship with your office, and hope you feel the same.

Sincerely,

/s/ Amos Gadson
Amos Gadson
Block Representative

/s/ William Fenton
William Fenton
Asst. Block Representative

/s/ Leroy Warrington
Leroy Warrington
Block Secretary

cc: Edward A. Aquilar, Esquire
Prison Master
William Badcok, Pa. Prison Society
Gaetano Curione, Warden
Frank Kent, A.C.L.U.

APPENDIX EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FONTROY, et al.	:	CIVIL ACTION
v.	:	86-4958
OWENS, et al.	:	

ORDER

(Filed April 21, 1988)

AND NOW, this 20th day of April, 1988, upon consideration of defendant David S. Owens' motion to dismiss and plaintiffs' response thereto, it is hereby ORDERED that the motion is GRANTED in part and DENIED in part.

1. Plaintiffs' allegation of inadequate security procedures states a claim under the eighth amendment. Plaintiffs have alleged sufficient facts to support their claim that the defendant's deliberate indifference to the safety of protective custody residents has subjected them to a pervasive risk of harm from other inmates. *See Morgan v. District of Columbia*, 824 F.2d 1049, 1057 (D.C. Cir. 1987); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985).

A defendant acts with deliberate indifference when he disregards a substantial risk of danger that is either known to him or would be apparent to a reasonable person in his position. *See Benson v. Cody*, 761 F.2d 335, 339 (7th Cir. 1985). Prison administrators are under an obligation to take reasonable measures to guarantee the safety of inmates. *Hudson v. Palmer*, 468 U.S. 517, 526-27

(1984). In reviewing a motion to dismiss a section 1983 claim based on inadequate prison security measures, this Court's task is limited to the inquiry whether the complaint can fairly be construed as alleging a violation of that obligation sufficient to constitute a deprivation of protected rights. *See Colburn v. Upper Darby Township, et al.*, No. 86-1675, slip op. at 15 (3d Cir. Jan. 26, 1988).

2. Plaintiffs' allegation of asbestos problems in their cells states an eighth amendment claim. Dangerous exposure to asbestos caused by defendant's deliberate indifference could deprive inmates of the minimal civilized measure of life's necessities, i.e, habitable shelter. Such a deprivation could violate the eighth amendment. *Union County Jail Inmates v. DiBuono*, 713 F.23 984, 998-99 (3d Cir. 1983).

3. Plaintiffs' claim of deprivation of access to the courts is DISMISSED. Plaintiffs fail to assert that the alleged restrictions in their use of the law library have resulted in actual deprivation of access. *See Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982).

4. Plaintiffs' claim of a first amendment violation based on prison practices affecting the opportunities of protective custody inmates to attend religious services is DISMISSED. Plaintiffs concede that they are permitted to attend one religious service per week on Sunday mornings. Plaintiffs' Complaint at 15 (Docket Entry No. 1). The gravamen of plaintiffs' claim is that they are not afforded the same opportunities to attend services and bible studies as are members of the general prison population. *Id.* Plaintiffs do not allege that the one service per week policy is not "reasonably related to legitimate penological

interests". *Turner v. Safely*, 107 S.Ct. 2254, 2261 (1987). Plaintiffs also allege that their one service per week is often denied due to a lack of escort officers and for other reasons. Allegations of negligence of the warden or other lower level prison emloyees [sic] in implementing this policy do not state a Section 1983 claim for violation of first amendment rights. *Compare Daniels v. Williams*, 106 S.Ct. 662, 666 (1986) (prison official's negligence causing unintended loss of or injury to prisoner's life, liberty or property does not implicate the Due Process Clause.

/s/ T. N. O'Neill
THOMAS N. O'NEILL, JR., J.

4/21/88
Copies to
D. Fontroy
C. S. Wells

APPENDIX EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK DALE FONTROY	:	CIVIL ACTION
Plaintiff	:	
vs.	:	
DAVID S. OWENS	:	
AND	:	
IRENE J. PERNSLEY	:	
AND	:	
GAETANO CURIONE	:	
AND	:	
HARRY MOORE	:	NO. 86-4958
Defendants	:	

SECOND AMENDED COMPLAINT

(Filed June 21, 1989)

A. PARTIES

1. Plaintiff, Derrick Fontroy (known herein as "Plaintiff"), is an individual and a citizen of the Commonwealth of Pennsylvania who, at the time of the incident giving rise to this action, resided at Holmesburg Prison, in Philadelphia, Pennsylvania. At all times material to this action, Plaintiff was an inmate in the Philadelphia Prison System.

2. Defendant David Owens (known herein as "Owens") is and at all times material was the superintendent of the Philadelphia Prison System in the Commonwealth of Pennsylvania. Owens is an individual who at all times relevant hereto was a duly appointed agent of the City of Philadelphia. Owens is sued in his official capacity.

3. Defendant Irene J. Pernsley (known herein as "Pernsley") is and at all times material was the Commissioner of the City of Philadelphia Department of Human Services, Philadelphia Prisons, in the Commonwealth of Pennsylvania. Pernsley is an individual who at all times material hereto was a duly appointed agent of the City of Philadelphia. Pernsley is sued in her official capacity.

4. Defendant Gaetano Curione (known herein as "Curione") is and at all times material was the warden of Holmesburg Prison. Curione is an individual who at all times material hereto was a duly appointed agent of the City of Philadelphia. Curione is sued in his official capacity.

5. Defendant Harry Moore (known herein as "Moore") is and at all times material was the deputy warden of Holmesburg Prison. Moore is an individual who at all times material was a duly appointed agent of the City of Philadelphia. Moore is sued in his official capacity.

B. JURISDICTION, VENUE AND NATURE OF ACTION

4. This action is brought pursuant to 42 U.S.C. Sections 1983 and 1988 and the Fifth, Eighth, and Fourteenth Amendments. Jurisdiction is founded on 28 U.S.C. Sections 1331 and 1343 and the aforementioned statutes and constitutional provisions. Declaratory relief is sought pursuant to 28 U.S.C. Sections 2201 and 2203.

5. This complaint, which was originally brought by the Plaintiff *pro se,* seeks relief from and redress for various unlawful acts and practices of civil rights violations that were committed against him by Defendants. Plaintiff seeks declaratory relief, damages and costs, including counsel fees.

6. This action is properly brought in this District because the claims arose here, the alleged wrongful acts and practices occurred here, prison records relevant to the alleged unlawful acts and practices are administered and maintained here, and Plaintiff was incarcerated here under the Defendants' supervision.

C. BACKGROUND FACTS

7. For a period of time beginning on or about November 5, 1984, and ending on or about September 6, 1986, Plaintiff was incarcerated with approximately 50 other prisoners in Holmesburg Prison's Protective Custody Unit ("PCU"), known as "D Rear".

8. The purpose of placing certain prisoners in PCU is to separate and protect them from the general population for various security reasons.

9. Although there was a security gate, purporting to prevent the inmates from the general population from gaining access to D Rear, this security gate was often improperly guarded or not guarded at all, allowing the general population inmates easy access to the inmates housed in D Rear.

10. Because the physical lay-out of the prison was such that inmates in D Rear had to pass through D Front in order to go anywhere else in the prison, e.g., to the infirmary, to the kitchen, to the library, etc., inmates in D Rear were forced to rely on prison escorts to accompany them to these various places for their own safety. However, beginning at 3:00 p.m. each day and lasting until the following morning, there were routinely no escorts available, and thus those inmates who needed to venture beyond D Rear were exposed to a tremendous risk of harm from the general population inmates.

11. Not only were general population inmates not properly prevented from gaining access to the inmates in D Rear, but many of those inmates were actually placed in D Rear intentionally, to alleviate problems of overcrowding elsewhere in the prison.

12. This practice of placing inmates who belonged in general population in the same area as the inmates of PCU had the effect of injecting into PCU the very inmates from whom those inmates rightfully in PCU needed protection, placing the latter group at a substantial and unreasonable risk of harm.

13. During the time when Plaintiff was incarcerated in the D Rear section of Holmesburg Prison, he was the victim of, witnessed, and learned of numerous crimes

committed by the general population inmates against him and the other residents of D Rear, including beatings, stabbings, and other various forms of assaults, theft, threats and extortion.

14. During the entire period of time which Plaintiff spent in D Rear, he was surrounded by the known carcinogenic, asbestos, which was loosely wrapped around pipes and visibly present in the walls and ceilings of both the D Rear cells and common areas, and to which Plaintiff was constantly exposed.

15. As a direct and proximate result of the inadequate security in PCU, and the resulting pervasive atmosphere of violence, Plaintiff was subjected to a constant and unreasonable fear and threat of harm and violence from other prisoners, Plaintiff was caused to suffer various injuries to his mind and body, all of which injuries will probably be permanent in nature and have in the past, and will in the future cause Plaintiff to suffer and endure great pain and suffering, physical pain, mental anguish, extreme fright, embarrassment and humiliation, anxiety, depression and loss of life's pleasures.

16. As a direct result of Plaintiff's constant, unreasonable and unnecessary exposure to asbestos in his place of confinement, Plaintiff was caused to suffer various injuries to his mind and body, all of which injuries will probably be permanent in nature and have in the past, and will in the future cause Plaintiff to suffer and endure great pain and suffering, physical pain, mental anguish, extreme fright, embarrassment and humiliation, anxiety, depression and loss of life's pleasures.

COUNT I

DERRICK DALE FONTROY VS. DAVID S. OWENS

17. Plaintiff hereby incorporates paragraphs 1 through 16 as though the same were set forth more fully hereat.

18. At all times relevant hereto, Defendant Owens was acting under color of state law and pursuant to his authority in his official capacity as superintendent of prisons.

19. Defendant Owens had the authority to, and did enact, maintain, approve, authorize, encourage, and/or tolerate a policy and/or custom whereby Plaintiff's civil rights were regularly violated as aforesaid.

20. Defendant Owens acted with deliberate indifference and callous disregard for the aforementioned violations of Plaintiff's civil rights by ignoring the substantial risk of danger posed by the aforementioned inhumane prison conditions, said conditions being known to him and/or apparent to a reasonable person in his position.

21. During a period of time encompassing May, 1985 through September, 1986, Plaintiff repeatedly communicated to Defendant Owens that he was being subjected to an unreasonable and substantial risk of harm and that he was being deprived of the minimum civilized measure of life's necessities, however, Defendant Owens responded to these complaints with deliberate indifference, perpetuating the deprivation of Plaintiff's civil rights as aforesaid.

22. The acts and conduct of Defendant Owens as aforesaid deprived Plaintiff of the rights, privileges and immunities guaranteed to him under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and, further, deprived Plaintiff of those rights, privileges and immunities guaranteed to Plaintiff pursuant to 42 U.S.C. Section 1983.

23. The acts and conduct of Defendant Owens were performed knowingly, intentionally, maliciously and with reckless indifference to, and callous disregard for, Plaintiff's protected Constitutional and statutory rights, by reason of which Plaintiff is entitled to an award of compensatory and punitive damages from said Defendant.

24. At all times material, there existed a regular, frequent, and continuous pattern of incidents which exposed Plaintiff to a pervasive risk of harm, both from other inmates and from exposure to asbestos in deprivation of his civil rights, which reflects that said policy and/or custom of the Defendant Owens was in force during the aforesaid period of Plaintiff's incarceration at Holmesburg Prison.

25. At all times material, Defendant Owens acted and/or conducted himself in accordance with the aforesaid policy and/or custom.

26. As a direct and proximate result of the acts and conduct of Defendant Owens, Plaintiff was caused to suffer the aforesaid injuries.

WHEREFORE, Plaintiff demands the following relief against Defendant Owens:

(a) A declaratory judgment that the policies, practices, and acts complained of herein are illegal and unconstitutional;

(b) Compensatory and punitive damages in an amount to be determined at the trial of this matter;

(c) Such other and further relief as this Court may deem appropriate, including costs and reasonable attorney's fees.

COUNT II

DERRICK DALE FONTROY VS. IRENE J. PERNSLEY

27. Plaintiff hereby incorporates paragraphs 1 through 26 as though the same were set forth more fully hereat.

28. At all times relevant hereto, Defendant Pernsley was acting under color of state law and pursuant to her authority in her official capacity as Commissioner.

29. Defendant Pernsley had the authority to, and did enact, maintain, approve, authorize, encourage, and/or tolerate a policy and/or custom whereby Plaintiff's civil rights were regularly violated as aforesaid.

30. Defendant Pernsley acted with deliberate indifference and callous disregard for the aforementioned violations of Plaintiff's civil rights by ignoring the substantial risk of danger posed by the aforementioned inhumane prison conditions, said conditions being known to her and/or apparent to a reasonable person in her position.

31. During a period of time encompassing May, 1985 through September, 1986, Plaintiff repeatedly communicated to Defendant Pernsley that he was being subjected to an unreasonable and substantial risk of harm and that he was being deprived of the minimum civilized measure of life's necessities, however, Defendant Pernsley responded to these complaints with deliberate indifference, perpetuating the deprivation of Plaintiff's civil rights as aforesaid.

32. The acts and conduct of Defendant Pernsley as aforesaid deprived Plaintiff of the rights, privileges and immunities guaranteed to him under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and, further, deprived Plaintiff of those rights, privileges and immunities guaranteed to Plaintiff pursuant to 42 U.S.C. Section 1983.

33. The acts and conduct of Defendant Pernsley were performed knowingly, intentionally, maliciously and with reckless indifference to, and callous disregard for, Plaintiff's protected Constitutional and statutory rights, by reason of which Plaintiff is entitled to an award of compensatory and punitive damages from said Defendant.

34. At all times material, there existed a regular, frequent, and continuous pattern of incidents which exposed Plaintiff to a pervasive risk of harm, both from other inmates and from exposure to asbestos in deprivation of his civil rights, which reflects that said policy and/or custom of the Defendant Pernsley was in force during the aforesaid period of Plaintiff's incarceration at Holmesburg Prison.

35. At all times material, Defendant Pernsley acted and/or conducted herself in accordance with the aforesaid policy and/or custom.

36. As a direct and proximate result of the acts and conduct of Defendant Pernsley, Plaintiff was caused to suffer the aforesaid injuries.

WHEREFORE, Plaintiff demands the following relief against Defendant Pernsley:

(a) A declaratory judgment that the policies, practices, and acts complained of herein are illegal and unconstitutional;

(b) Compensatory and punitive damages in an amount to be determined at the trial of this matter;

(c) Such other and further relief as this Court may deem appropriate, including costs and reasonable attorney's fees.

COUNT III

DERRICK DALE FONTROY VS. GAETANO CURIONE

37. Plaintiff hereby incorporates paragraphs 1 through 36 as though the same were set forth more fully hereat.

38. At all times relevant hereto, Defendant Curione was acting under color of state law and pursuant to his authority in his official capacity as warden of Holmesburg Prison.

39. Defendant Curione enacted, maintained, approved, authorized, encouraged, and/or tolerated a

policy and/or custom whereby Plaintiff's civil rights were regularly violated as aforesaid.

40. Defendant Curione acted with deliberate indifference and callous disregard for the aforementioned violations of Plaintiff's civil rights by ignoring the substantial risk of danger posed by the aforementioned inhumane prison conditions, said conditions being known to him and/or apparent to a reasonable person in his position.

41. During a period of time encompassing May, 1986 through September, 1986, Plaintiff repeatedly communicated to Defendant Curione that he was being subjected to an unreasonable and substantial risk of harm and that he was being deprived of the minimum civilized measure of life's necessities, however, Defendant Curione responded to these complaints with deliberate indifference, perpetuating the deprivation of Plaintiff's civil rights as aforesaid.

42. The acts and conduct of Defendant Curione as aforesaid deprived Plaintiff of the rights, privileges and immunities guaranteed to him under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and, further, deprived Plaintiff of those rights, privileges and immunities guaranteed to Plaintiff pursuant to 42 U.S.C. Section 1983.

43. The acts and conduct of Defendant Curione were performed knowingly, intentionally, maliciously and with reckless indifference to, and callous disregard for, Plaintiff's protected Constitutional and statutory rights, by reason of which Plaintiff is entitled to an award

of compensatory and punitive damages from said Defendant.

44. At all times material, there existed a regular, frequent, and continuous pattern of incidents which exposed Plaintiff to a pervasive risk of harm, both from other inmates and from exposure to asbestos in deprivation of his civil rights, which reflects that said policy and/or custom of the Defendant Curione was in force during the aforesaid period of Plaintiff's incarceration at Holmesburg Prison.

45. At all times material, Defendant Curione acted and/or conducted himself in accordance with the aforesaid policy and/or custom.

46. As a direct and proximate result of the acts and conduct of Defendant Curione, Plaintiff was caused to suffer the aforesaid injuries.

WHEREFORE, Plaintiff demands the following relief against Defendant Curione:

(a) A declaratory judgment that the policies, practices, and acts complained of herein are illegal and unconstitutional;

(b) Compensatory and punitive damages in an amount to be determined at the trial of this matter;

(c) Such other and further relief as this Court may deem appropriate, including costs and reasonable attorney's fees.

COUNT IV

DERRICK DALE FONTROY VS. HARRY MOORE

47. Plaintiff hereby incorporates paragraphs 1 through 46 as though the same were set forth more fully hereat.

48. At all times relevant hereto, Defendant Moore was acting under color of state law and pursuant to his authority in his official capacity as deputy warden.

49. Defendant Moore enacted, maintained, approved, authorized, encouraged, and/or tolerated a policy and/or custom whereby Plaintiff's civil rights were regularly violated as aforesaid.

50. Defendant Moore acted with deliberate indifference and callous disregard for the aforementioned violations of Plaintiff's civil rights by ignoring the substantial risk of danger posed by the aforementioned inhumane prison conditions, said conditions being known to him and/or apparent to a reasonable person in his position.

51. During a period of time encompassing May, 1986 through September, 1986, Plaintiff repeatedly communicated to Defendant Moore that he was being subjected to an unreasonable and substantial risk of harm and that he was being deprived of the minimum civilized measure of life's necessities, however, Defendant Moore responded to these complaints with deliberate indifference, perpetuating the deprivation of Plaintiff's civil rights as aforesaid.

52. The acts and conduct of Defendant Moore as aforesaid deprived Plaintiff of the rights, privileges and

immunities guaranteed to him under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and, further, deprived Plaintiff of those rights, privileges and immunities guaranteed to Plaintiff pursuant to 42 U.S.C. Section 1983.

53. The acts and conduct of Defendant Moore was performed knowingly, intentionally, maliciously and with reckless indifference to, and callous disregard for, Plaintiff's protected Constitutional and statutory rights, by reason of which Plaintiff is entitled to an award of compensatory and punitive damages from said Defendant.

54. At all times material, there existed a regular, frequent, and continuous pattern of incidents which exposed Plaintiff to a pervasive risk of harm, both from other inmates and from exposure to asbestos in deprivation of his civil rights, which reflects that said policy and/or custom of the Defendant Moore was in force during the aforesaid period of Plaintiff's incarceration at Holmesburg Prison.

55. At all times material, Defendant Moore acted and/or conducted himself in accordance with the aforesaid policy and/or custom.

56. As a direct and proximate result of the acts and conduct of the Defendant Moore, Plaintiff was caused to suffer the aforesaid injuries.

WHEREFORE, Plaintiff demands the following relief against Defendant Moore:

(a) A declaratory judgment that the policies, practices, and acts complained of herein are illegal and unconstitutional;

(b) Compensatory and punitive damages in an amount to be determined at the trial of this matter;

(c) Such other and further relief as this Court may deem appropriate, including costs and reasonable attorney's fees.

/s/ Lisa G. Miller
LISA G. MILLER,
Attorney for Plaintiff

OF COUNSEL:
SIDKOFF, PINCUS & GREEN, P.C.
530 WALNUT STREET, 12TH FLOOR
PHILADELPHIA, PENNSYLVANIA 19106
(215) 574-0600

6/21/89

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK DALE FONTROY	:	CIVIL ACTION
Plaintiff	:	
vs.	:	
DAVID S. OWENS	:	
AND	:	
IRENE J. PERNSLEY	:	
AND	:	
GAETANO CURIONE	:	
AND	:	
HARRY MOORE	:	NO. 86-4958
Defendants	:	

CERTIFICATION OF SERVICE

LISA G. MILLER, ESQUIRE, hereby certifies that she served a true and correct copy of Plaintiff's Second Amended complaint by First Class Mail on defense counsel, MICHAEL COATES, ESQUIRE, Assistant City Solicitor, City of Philadelphia, at his offices located at 1101

Market Street, 9th Floor, Philadelphia, PA 19107, on Wednesday, June 21, 1989.

/s/ Lisa G. Miller
LISA G. MILLER,
Attorney for Plaintiff

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 WALNUT STREET, 12TH FLOOR
PHILADELPHIA, PENNSYLVANIA 19106
(215) 574-0600

6/21/89

APPENDIX EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DALE FONTROY	:	CIVIL ACTION
vs.	:	NO. 86-4958
DAVID S. OWENS	:	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, David S. Owens,[1] by and through his undersigned counsel hereby moves this Honorable Court pursuant to Federal Rule of Civil Procedure (hereinafter Fed. R.C.P.) 56 to enter summary judgment in favor of defendant on the grounds that there exists no genuine issue of material fact and that the moving defendant is entitled to judgment as a matter of law.

The grounds for the Motion are more fully set forth in the accompanying Memorandum of Law.

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[1] Plaintiff has also named Gaetano Curion, Irene Pernsley, and Harry Moore as defendants. Their inclusion as defendants in this lawsuit is currently pending resolution by Order of this Court dated December 3, 1990, refering[sic] the matter to the Honorable M. Faith Angell.

WHEREFORE, defendants respectfully requests that this Court enter an Order granting summary judgment in favor of defendant.

Respectfully yours,

CHARISSE R. LILLIE
CITY SOLICITOR

NORMA S. WEAVER
CHIEF DEPUTY CITY SOLICITOR

NORMAN G. PRAJZNER
DIVISIONAL DEPUTY CITY SOLICITOR

BY: /s/ M.F. Coates
MICHAEL F. COATES
ASSISTANT CITY SOLICITOR

Attorneys for Defendant(s)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DALE FONTROY	:	**CIVIL ACTION**
vs.	:	**NO. 86-4958**
DAVID S. OWENS	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On or about April 28, 1987, plaintiff filed a Complaint pursuant to 42 U.S.C. Section 1983, alleging various violations of his civil rights. Defendant, David S. Owens, filed a Motion to Dismiss plaintiff's Complaint that was granted in part and denied in part by Order dated April 20, 1988. The Order allowed two of plaintiffs allegations to remain as part of his cause of action. The Court was to entertain plaintiff's allegations that defendant acted with deliberate indifference to plaintiff's safety in the Protective Custody Unit (hereinafter "PCU") and that defendant acted with deliberate indifference by exposing plaintiff to asbestos in the P.C.U. Each of these claims were characterized as Eighth Amendment claims by the Court in its Order.

Thereafter, plaintiff filed a Second Amended Complaint by and through his counsel. Defendant, accordingly filed an Answer to the Second Amended Complaint. In his Second Amended Complaint, plaintiff sets forth a melange of allegations that suggest injury to plaintiff while incarcerated in "D Rear" section (also known as the P.C.U.) however, this offers no specificity as to the type of

harm actually suffered by plaintiff or indication of the time date or frequency of occurrence of the harm (Complaint at paragraph 13.)

The complaint also alleges that he was exposed to the known carcinogenic, asbestos, that was present in the "D Rear" section. Once again, plaintiff suggests injury as a result of the alleged exposure to asbestos without any specificity as to the type of injury or ailment suffered or the parts of the body affected.

Plaintiff alleges that this alleged inadaquate [sic] security and alleged exposure to asbestos violates his right against cruel and unusual punishment protected by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and are therefore actionable under 42 U.S.C. Section 1983 (1988). Plaintiff demands both monetary and injunctive relief.

In this motion, defendant requests the Court to enter judgment in his favor on all of plaintiff's claims, as plaintiff has in actuality suffered no deprivation of a cognizable or protected federal constitutional rights. In support of his motion, defendants attach affidavits from Philadelphia Prison personnel.

II. FACTS

Plaintiff, Derrick Dale Fontroy was incarcerated in "D Rear" at Holmesburg Prison from 10/19/84 to 11/2/84, Philadelphia County from 11/29/84 to 1/16/85, 8/31/85 and 9/8/86.[2] *See* Affidavit of Deputy Superintendent John

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[2] It should be noted that plantiff's[sic] claims are limited only to the time plaintiff was incarcerated at Holmesburg in "D Rear". (Protective Custody Unit). *See generally* Complaint.

Daughen attached as Exhibit "A". While an inmate at Holmesburg, plaintiff was incarcerated in "D Rear" (Protective Custody Unit) from 11/29/84 to 1/15/85 and 8/31/85. See Exhibit "A". On 198 [sic], plaintiff was transferred to the State Correctional Institution at Greatorford, Pennsylvania. Sometime, thereafter, plaintiff was transferred to the United States Prison at Lompoc, California within the federal prison system.

III. ARGUMENT

The principals governing a motion for summary judgment are well established. Summary judgment should be granted

> if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed R. Civ. P. 56(c).

In determining whether a genuine issue of material fact exists, the court must consider the evidence presented in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences arising from the facts. *Lang v. New York Life Insurance Co.*, 721 F.2d 118, 119 (3d Cir. 1983); *Bank of America National Trust & Savings Ass'n v. Hotel Rittenhouse Assoc.*, 595 F. Supp. 800, 802 (E.D. Pa. 1984). Nonetheless, in response to a properly supported motion for summary judgment, the nonmoving party may not rest on conclusory allegations in the pleadings, but must by affidavit

or otherwise set forth specific facts sufficient to create a genuinely disputed material factual issue. *Fireman's Insurance Co v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982); *Tilden Financial Corp. v. Palo Tire Service Services, Inc.*, 596 F2d 604, 608 (3d Cir. 1979); *Armstrong v. School District*, 597 F. Supp. 1309, 1312 (E.D. Pa. 1984); Fed. R. Civ. P. 56(e).

In this case, the pleadings before the Court, together with the affidavits attached as exhibits to this memorandum, demonstrate that no genuinely disputed issue of material fact exists. As a matter of law, plaintiff has failed to establish any claim against defendants. Therefore, defendants request this Court to enter summary judgment against plaintiff and in favor of defendants.

A. The Plaintiff Has Failed to Establish a Claim Under 42 U.S.C. §1983

In order to prevail on a claim alleging violations of 42 U.S.C. § 1983 (1988), a plaintiff must establish two essential elements. First, the conduct complained of must have been done by some person acting under color of law; and second, such conduct must have subjected the plaintiff' to deprivation of rights, privileges, or immunities protected by the Constitution or the laws of the United States. *See* 42 U.S.C. § 1983 (1988).[3]

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[3] Section 1983 provides in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

For the purposes of this motion, it is conceeded [sic] that the named defendants were acting under color of law. The inquiry thus is limited to whether, as a matter of law, the defendants violated any rights, privileges, or immunities secured to plaintiff by the Consititution [sic]. Reading the Complaint liberally, plaintiff apparently is asserting that his exposure to asbestos and inadaquate [sic] security in the P.C.U. violates the eighth and fourteenth amendments to the United States Constitution and is therefore actionable under 42 U.S.C. § 1983. (Complaint paragraph 13 and 14.) Because plaintiff has failed to establish a deprivation of any rights guaranteed by the eighth or fourteenth amendments, he has failed to state a claim under section 1983. Accordingly, this Court should enter judgment in favor of the defendants.

The eighth amendment, applicable to the states through the fourteenth amendment, *Robinson v. California*, 370 U.S. 660 (1962), prohibits prison conditions that inflict cruel and unusual punishment. *Rhodes v. Chapman*, 452 U.S. 337, 345-47 (1981); *Peterkin v. Jeffes*, 661 F. Supp. 895, 895 (E.D. Pa. 1987). In *Rhodes v. Chapman*, 452 U.S. 337 (1981), the United States Supreme Court held that the eighth amendment proscribes conditions that result in an "unnecessary and wanton" infliction of pain, including practices that are "totally without penological justification," *id.* at 346, or that "resulted in unquestioned and serious deprivation of basic human needs," *id.* at 347, as those needs are measured against "evolving standards of

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in an action at law, suit in equity, or other proper proceeding for redress . . .
42 U.S.C. § 1983 (1988).

decency that mark the progress of a maturing society." *Id.* at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1957)).

Under these principals, the *Rhodes* Court instructed that in assessing whether particular actions or conditions violate the eighth amendment, a district court must examine the totality of the circumstances of confinement to determine whether exposure to the cumulative effects of prison conditions might subject inmates to cruel and unusual punishment. *Id.* at 346. In this examination, the Court stated, the trial court's judgment should be "informed by objective factors to the maximum possible extent," *id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)), noting that conditions that could not "be said to be cruel and unusual under contemporary standards" are not unconstitutional. 425 U.S. at 347.

In accord with *Rhodes v. Chapman*, courts in this district have held that mere exposure to asbestos is not a condition that can be said to be cruel and unusual. "A prisoner's mere exposure to asbestos does not constitue [sic] a violation of the eighth amendment." *Jones v. Owens*, No. 89-8977, slip op. at 3 n.3 (E.D. Pa. Jan 3, 1990), attached hereto as Exhibit "B". *See also Gonzalez v. Lyons*, No. 89-3711, slip op. at 1 (E.D. Pa. June 15, 1989) ("it is well-settled that the kinds of conditions described by plaintiff [including exposure to asbestos], however unpleasant they may be, do not amount to a violation of the Eighth Amendment"), attached hereto as Exhibit "C"; *see also Nestor v. Meese*, No.87-0794, slop [sic] op. at 3-4 (M.D. Pa. Oct. 29, 1987) ("While the use of asbestos may be unfortunate, the court cannot construe its existence alone as a claim of constitutional proportions"), attached hereto as Exhibit "D".

Here, plaintiff claims that there is asbestos in Holmesburg and that his exposure to the substance, per se, subjected him to cruel and unusual punishment (Complaint at paragraph 14.) To the contrary, plaintiff's claim does not rise to the level of an eighth amendment violation, since plaintiff has failed to establish anything more than the mere presence of and exposure to asbestos (defendant does not admit however, that plaintiff was actually exposed). *Jones, Gonzalez,* and *Nestor,* make clear that such a claim does not amount to a deprivation of an eighth amendment right. Having failed to establish any deprivation of any constitutional right, plaintiff has failed to state a claim under section 1983 as a matter of law, and this Court should enter judgment in favor of defendants.

Even if plaintiff might otherwise be said to have stated a cognizable claim of a constitutional deprivation, judgment should be entered in favor of defendants because the Complaint is devoid of any facts that support the allegation that asbestos is present in Holmesburg. Plaintiff has not alleged, and cannot prove, how he was exposed to asbestos during his incarceration, or the degree of his exposure.

Plaintiff's claim must also fail because the Complaint in other respects similarly does not support a section 1983 action. To make out a case under section 1983, the plaintiff must show actual participation by defendants in the unlawful conduct, or actual knowledge of and acquiescence in that conduct. *Roach v. Kligman,* 412 F. Supp. 521, 528 (E.D. Pa. 1976); *see also Rizzo v. Goode,* 506 F.2d 542 (3d Cir. 1975), *rev'd on other grounds'* 423 U.S. 362 (1976).

Rather than setting forth the basis of the claim or the conduct complained of with the specificity required in civil rights actions, *see, e.g., DeFerro v. Coco*, 709 F. Supp. 643, 644 (E.D. Pa. 1989) (quoting *Colburn v. Upper darby Township*, 838 F.2d 663, 666 (ed Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1338 (1989)), the Complaint merely states in general terms that P.C.U. inmates were subjected to risk of harm from general population inmates and that plaintiff was victimized as a result, and that plaintiff was exposed to the carcinogenic, asbestos.

Also fatal to plaintiff's claims are the absence of any facts in the Complaint or in discovery to suport [sic] the allegations that plaintiff actually suffered some measurable harm (physical and/or mental) as a result of inadaquate [sic] security in the PCU. Likewise, there is an absence of any facts to support plaintiff's allegations that his alleged exposure to asbestos caused him some measurable harm (physical and/or mental.)

Similarly unsupported are plaintiff's allegations that plaintiff has "suffered" various injuries to his mind and body, all of which injuries will problably [sic] be permanent in nature and have in the past, and will in the future cause plaintiff to suffer and endure great pain and suffering, physical pain, mental anguish, extreme fright, embarrassment and humiliation, anxiety, depression and loss of life's pleasures. (Complaint paragraphs 15 and 16.)

In any event, plaintiff's "mental anguish" claim, an apparent emotional pain and suffering claim (*see* Complaint at paragraphs 15 and 16) is not cognizable under 42 U.S.C. § 1983. *See, e.g., Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985) (emotional deistress [sic] claim not

cause of action under section 1983); *Rojas v. Alexander's Department Store*, 654 F. Supp. 856, 859 (E.D.N.Y. 1986) (same); *Horne v. Farrell*, 560 F. Supp. 219, 225 (M.D. Pa. 1983) (same). Moreover, it is well established that "[s]ection 1983 imposes liability for violations of rights protected by the constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

Plaintiff avers that because of his alleged exposure to asbestos, he suffers from emotional distress apparently for fear of contracting asbestos-related diseases and from fear of inadauqate [sic] security in the P.C.U.. Plaintiff's alleged injury states nothing more than a state common law tort of intentional infliction of emotional distress, not a deprivation of a federally protected right. As such, it is not cognizable under section 1983.

In sum, even if plaintiff could establish a constitutional deprivation for exposure to asbestos, plaintiff's allegations are insufficient to support a section 1983 claim. Thus, this Court should grant defendants' motion and enter judgment in favor defendants.

Respectfully yours,

CHARISSE R. LILLIE
CITY SOLICITOR

NORMA S. WEAVER
CHIEF DEPUTY CITY SOLICITOR

NORMAN G. PRAJZNER
DIVISIONAL DEPUTY CITY SOLICITOR

/s/ M. F. Coates
MICHAEL F. COATES
ASSITANT [sic] CITY SOLICITOR
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(215) 592-5254/55

Attorneys for City of Philadelphia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DALE FONTROY	:	CIVIL ACTION
	:	
vs.	:	NO. 86-4958
DAVID S. OWENS	:	

CERTIFICATION OF SERVICE

I do hereby certify that service of a true and correct copy of the within Motion For Summary Judgment has been served to Plaintiff's counsel by United States mail.

LISA MILLER, ESQUIRE
SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street
12th Floor
Philadelphia, PA 19106

/s/ M. F. Coates
MICHAEL F. COATES
ASSISTANT CITY SOLICITOR
ATTORNEY ID. NO. 45943
1101 MARKET STREET/
9th Floor
PHILADELPHIA, PA 19107-2996
(215) 592-5254

Attorney for Defendants

Date: DECEMBER 21, 1990

EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA *
* SS
COUNTY OF PHILADELPHIA *

AFFIDAVIT OF JOHN E. DAUGHEN

1. I am presently the Deputy Superintendent – Administration of the Philadelphia County Prisons, having held this position since June, 1987.

2. In my capacity as Deputy Superintendent, I have supervisory responsibility for the operation of the Philadelphia County Prisons.

3. Based on my review of the custodial file, I am aware that Derrick Fontroy, Institutional No. 84-14074, was incarcerated at Holmesburg Prison, Philadelphia County, from 10/19/84 through 11/2/84, from 11/29/84 to 1/16/85 and from 8/31/85 through 9/8/86 when he was discharged from our system.

4. From 8/31/85 to 3/20/86, Mr. Fontroy was incarcerated in D-Rear. On 3/20/86, he was moved to F-Rear and returned to D-Rear on 4/5/86 where he remained until 9/8/86. D-Rear was known as the protective custody unit.

/s/ John E. Daughen
JOHN E. DAUGHEN

Sworn to and subscribed

before me this [illegible] day

of December, 1990

Dawn C. Madison

Notary Public

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM SEYMOUR/JONES	:	CIVIL ACTION
v.	:	NO. 89-8977
DAVID S. OWENS, Commissioner of Corrections, et al.	:	

MEMORANDUM AND ORDER

(Filed Jan. 4, 1990)

VanARTSDALEN, S.J. January 3, 1990

In this latest action brought by plaintiff William Seymour/Jones[1], currently an inmate at Graterford state prison, plaintiff has filed a pro se civil rights complaint pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988, seeking declaratory relief, damages and costs, including counsel fees, against various Pennsylvania state prison officials "and all other John Doe defendants as individuals." Plaintiff also asks that this action be certified as a class action pursuant to Federal Rule of Civil Procedure 23.

Plaintiff's complaint essentially alleges that: he and other prison inmates at Graterford and various other prisons in the Pennsylvania state prison system were and

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[1] I am aware of several previous federal actions filed by plaintiff variously under the names "William Seymour" and "William Jones". Mr. Seymour/Jones continues to submit various civil rights complaints at the rate of approximately two per week.

are exposed to asbestos in the prisons; that the kitchen area at Graterford where plaintiff worked contained asbestos "and the cooking pots do not have lids on them"; that the overcrowded prison conditions pose a fire hazard; and that there [sic] inadequate means of egress from the cellblocks in the event of a fire. Plaintiff claims that these conditions violate his right to be free of cruel and unusual punishment under the eighth amendment of the Constitution.

Along with his complaint, plaintiff has filed a request for leave to proceed *in forma pauperis*. As it appears plaintiff is unable to pay the cost of commencing this action, leave to proceed *in forma pauperis* is granted.

Plaintiff has failed to state a valid cause of action under 42 U.S.C. § 1983. A civil rights complaint must "contain a modicum of factual specificity identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs." *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir. 1981). Plaintiff nowhere describes "the role that the named defendants played in his past exposure to asbestos," *see Morris v. Superintendent A. Lyons*, No. 88-2200, slip op. at 1 (E.D. Pa. July 11, 1988), nor their role in plaintiff's other alleged constitutional deprivations. Because there is no respondeat superior liability in section 1983 cases, the fact that defendants may have supervisory positions at Graterford or over the Pennsylvania correctional system is insufficient to impose liability on them. *See Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976); *Morris*, slip op. at 2. The complaint will therefore be dismissed as frivolous.[2]

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[2] Plaintiff's claims under 42 U.S.C. §§ 1981, 1985, 1986 and 1988 must be dismissed for additional reasons. Plaintiff has not alleged any discrimination on account of race as is required

Because plaintiff has not properly alleged a personal claim for damages[3] under section 1983, I will also deny plaintiff's request for class certification at this time.

An Order follows.

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under 42 U.S.C. § 1981. *See General Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982). Nor does he allege that a conspiracy existed for the purposes of depriving him of equal protection or equal privileges and immunities under the law, which is a necessary element of a cause of action under 42 U.S.C. § 1985. Because an essential element of a cause of action under 42 U.S.C. § 1986 is the existence of a claim under § 1985, *see Rogin v. Bensalem Twp.,* 616 F.2d 680, 697 (3d Cir. 1980), *cert. denied sub nom., Mark-Garner Assoc. v. Bensalem Twp.,* 450 U.S. 1029 (1981), plaintiff has failed to allege a cause of action under § 1986. Because plaintiff's claims are dismissed, 42 U.S.C. § 1988 provides no basis for an award of attorney's fees.

[3] Although plaintiff on page 2 of his complaint asks only for declaratory relief, damages and costs, he asks on page 6 to "Have asbestos remove [sic] [from] all correctional institutions and their administration buildings for personel [sic]." A prisoner's mere exposure to asbestos does not constitute a violation of the eighth amendment. *See Gonzalez v. Lyons,* No. 89-3711, slip op. (E.D. Pa. June 15, 1989) ("It is well settled that the kinds of conditions described by plaintiff [including exposure to asbestos] however unpleasant they may be, do not amount to a violation of the Eighth Amendment); *Nestor v. Meese,* No. 87-0794, slip op. at 3-4 (M.D. Pa. October 29, 1987) ("While the use of asbestos may be unfortunate, the court cannot construe its existence alone as a claim of constitutional proportions").

Plaintiff also does not aver that any conduct of defendants amounted to deliberate indifference to his medical needs, *see Estelle v. Gamble,* 429 U.S. 97, 106 (1976), nor can the complaint be construed in this way. As a matter of fact, plaintiff himself admits that asbestos was removed from the pipes in his cellblock. *See* complaint at 3. Accordingly, any claim for injunctive relief for the removal of asbestos must also fail.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM SEYMOUR/JONES	:	CIVIL ACTION
v.	:	NO. 89-8977
DAVID S. OWENS, Commissioner of Corrections, et al.	:	

ORDER

(Filed Jan. 4, 1990)

After due consideration of plaintiff William Seymour/Jones' complaint, and in accordance with the accompanying memorandum, it is

ORDERED as follows:

1. Plaintiff's motion to proceed in forma pauperis is granted;

2. Plaintiff William Seymour/Jones' complaint in Civil Action No. 89-8977 is dismissed as frivolous as to all defendants pursuant to 28 U.S.C. § 1915 (d).

BY THE COURT:

/s/ Donald W. VanArtsdalen
Donald W. VanArtsdalen, S.J.

January 3, 1990

1/5/90

cc William Seymore Jones, P.P.R.

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEDWIN GONZALEZ	:	CIVIL ACTION
v.	:	NO. 89-3711
EDMOND H. LYONS, SUPERINTENDENT OF PHILA PRISONS, et al.	:	

MEMORANDUM

(Filed June 16, 1989)

WALDMAN, J. June 15, 1989

Plaintiff has filed a *pro se* 42 U.S.C. § 1983 civil rights complaint against the Superintendent of the Philadelphia prisons and the warden and deputy warden of Holmesburg Prison. The complaint charges that the plaintiff's constitutional rights have been violated by the conditions at the prison which, according to the complaint, include exposure to asbestos, lead poisoning from paint, broken showers, rats and bugs.

With his complaint, plaintiff filed a request for leave to proceed *in forma pauperis*. As it appears plaintiff is unable to pay the costs of commencing the action, leave to proceed *in forma pauperis* is granted.

It is well-settled that the kinds of conditions described by the plaintiff, however unpleasant they might be, do not amount to a violation of the Eighth Amendment. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *e.g., Peterkin v. Jeffes*, 661 F. Supp. 895, 899-900 (E.D. Pa.

1987). The test which has been applied is whether the conditions in this prison deprive inmates of the minimal civilized measures of life. *Union County Jail Inmates v. DeBueno*, 712 F. 2d 984, 997 (3d Cir. 1988), quoting *Rhodes, supra*, 452 U.S. at 347. As undesirable as these conditions may be, it is an unfortunate fact that significant numbers of non-institutionalized persons in society at large are exposed to them.

Accordingly, this complaint is dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN GONZALEZ	:	CIVIL ACTION
	:	
v.	:	No. 89-3711
EDMOND LYONS,	:	
SUPERTENDENT [sic]	:	
PHILA PRISONS, *et al*	:	

ORDER

(Filed June 16, 1989)

AND NOW, this 15th day of June, 1989, in accordance with the Memorandum filed this date,

IT IS ORDERED that:

1. Leave to proceed *in forma pauperis* is GRANTED.

2. This complaint is DISMISSED as frivolous pursuant to 28 U.S.C. §1915(d).

/s/ Jay C. Waldman
Jay C. Waldman, j.

6-16-89

Copy/P.P.

EXHIBIT "D"

Lewis R. Nestor, Plaintiff v. Edwin Meese, et al., Defendants

Civil No. 87-0794

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1987 U.S. Dist. LEXIS 10197

October 29, 1987, Decided

OPINION BY: [*1]
KOSIK

OPINION:

MEMORANDUM AND ORDER

KOSIK, J.

1987 U.S. Dist. LEXIS 10197, *1

Plaintiff, Lewis R. Nestor, a prisoner who was confined at the United States Penitentiary, Lewisburg, Pennsylvania n1 filed the instant action pursuant to 28 U.S.C. § 1331 on June 6, 1987. With his complaint, plaintiff filed a request to proceed in forma pauperis. By Order dated June 12, 1987, this court granted plaintiff's request to

proceed in forma pauperis and directed the complaint to be served on defendants. On August 7, 1987, defendants filed a motion to dismiss or in the alternative for summary judgment and a memorandum in support thereof. On August 18, 1987 defendants filed a supplemental memorandum. On September 1, 1987, plaintiff filed an untimely request for extension of time in which to respond to the defendants' motion to dismiss or in the alternative for summary judgment. However, because plaintiff was proceeding pro se, this court granted plaintiff's requested thirty [30] day extension to September 24, 1987. To date, plaintiff has failed to file any response to defendants' motion, nor has he requested any additional time in which to do so. Accordingly, we will consider the defendants' motion ripe for disposition and will proceed [*2] to address the merits of the motion. n2

n1 Subsequent to the filing of the instant action, plaintiff was transferred to another federal facility.

n2 Because defendants have attached declarations and other documentation in support of their motion, we will construe defendants' motion to be one for

summary judgment pursuant to Rule 56.

The basis of plaintiff's complaint was that he was confined in the Special Housing Unit at the United States Penitentiary, Lewisburg, that he had been diagnosed as having a dermatological condition, that the ventilation and water pipes i [sic] the Selective Housing Unit were wrapped in asbestos insulation, which was deteriorating,

and that as a result of plaintiff's confinement, defendants exhibited total disregard and indifference for his health. Further, plaintiff alleges that the continued negligence of defendants to correct known dangers of a toxic and carcinogenic substance, to wit, asbestos, has shown wanton, willful and malicious negligence, indifference for the health and well being of plaintiff and poses a serious health threat to his respiratory system. Finally, plaintiff avers that such conduct by defendants violates state and federal laws [*3] and constitutes cruel and unusual punishment. Plaintiff requests the court to award compensatory and punitive damages. n3

n3 While this court will treat the instant action as a Bivens action, we believe it is important to note, as defendants indicate in their memorandum and supporting documentation, that plaintiff also filed a claim with the Bureau of Prisons under the Federal Torts Claim Act. Said claim is still pending. See declaration of David R. Essig, Document 6.

1987 U.S. Dist. LEXIS 10197, *3

In order to state a cognizable civil rights action under 28 U.S.C. § 1331, the plaintiff must show that he has been deprived of a right protected by the United States Constitution. Carlson v. Green, 446 U.S. 14 (1980). The Supreme Court has ruled that in order for prison conditions to constitute cruel and unusual punishment there must be a serious deprivation of basic human needs. Hutte v. Finney, 437 U.S. 678 (1978). While the use of asbestos may be unfortunate, the court cannot construe its existence alone as a claim of constitutional proportions. Nor can the court

find the existence of the Eighth Amendment prohibition against cruel and unusual punishment premised on plaintiff's allegations of indifference [*4] to his health needs. Plaintiff has provided no evidence of serious illness resulting from the existence of asbestos to which the defendants have manifested deliberate indifference. See Estelle v. Gamble, 429 U.S. 97 (1976). With the above standards in mind, we will consider the defendants' motion for summary judgment.

In support of their motion for summary judgment, defendants attach a declaration of Dr. Paolo DePetrillo, n4 a Lewisburg Penitentiary physician, with a medical summary outlining the care and treatment plaintiff received at USP-Lewisburg. In the addendum to his medical summary, Dr. DePetrillo indicates that he could find "no evidence of complaints that would be consistent with a diagnosis of asbestosis." Thus, the undisputed declarations and medical summaries submitted by defendants evidence that plaintiff Nestor has not been

denied medical treatment, nor has the prison staff been deliberately indifferent to his health concerns.

n4 See Document 6.

Additionally, we cannot find that plaintiff's allegations that he was exposed to asbestos establishes a claim for violation of his right to be free from cruel and unusual punishment. As the declaration of Dr. DePetrillo [*5] indicates he reviewed plaintiff's medical charts and could find no complaints that could possibly be related to

asbestos exposure. Further, he notes that it generally takes at least ten [10] years for such symptoms to manifest themselves following exposure.

Defendants have submitted the declaration of Harry Holliday, Safety Manager at the United States Penitentiary, Lewisburg, Pennsylvania. n5 In his declaration, Mr. Holliday states that air sampling tests were performed at USP-Lewisburg and that an independent testing laboratory certified that no asbestos contamination was detected in the samples collected from the Special Housing Unit on July 16, 1987. Also, attached to the supplemental memorandum was a declaration of James Schwartz, Engineering Technician at the USP-Lewisburg, who states that the ventilation and plumbing system of the Special Housing Unit appeared to be in good order and not in need of repair. Photographs were

included as an addendum to his declaration.

n5 See Document 7, declarations attached to defendants' supplemental memorandum in support of motion to dismiss or in the alternative for summary judgment.

Summary judgment is appropriate only when there [*6] is no genuine issue of material fact to be resolved. Fed. R. Civ. P. 56; Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982); Continental Ins. v. Bodie, 682 F.2d 436, 438 (3d Cir. 1982). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. The entire record must be examined in light most favorable to the non-saving

party. Continental Ins., supra. Additionally, the Supreme Court has recently ruled that Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, U.S. , , 106 S. Ct. 2548, 2552-2553 (1986). The Court further states that: "Rule 56(c) . . . requires the nonsaving party to go beyond the pleading and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Id. at [*7] , 106 S. Ct. at

2553.

As pointed out above, plaintiff has failed to respond to defendants' motion for summary judgment and supporting documentation. We believe that the declarations submitted by defendants in support of their motion negate plaintiff's bare allegations that defendants exhibited deliberate indifference to his health and medical needs and that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment. Accordingly, the defendants' motion for summary judgment will be granted.

ORDER

NOW, this 29th day of October, 1987, IT IS HEREBY ORDERED THAT:

[1] defendants' motion for summary judgment is granted;

[2] judgment is entered in favor of the defendants and against the plaintiff;

[3] the Clerk of Court is directed to close this case; and

[4] any appeal from this Order will be deemed frivolous, not taken in good faith, and lacking in probable cause.

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APPENDIX EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY	:	CIVIL ACTION
v.	:	
DAVID S. OWENS, ET AL.	:	NO. 86-4958

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

LISA G. MILLER
MICHAEL L. BLOCK
Attorneys for Plaintiff

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street
Philadelphia, PA 19106
(215) 574-0600

Date: January 23, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY	:	**CIVIL ACTION**
v.	:	
DAVID S. OWENS, ET AL.	:	**NO. 86-4958**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, Derrick Fontroy, by his attorneys, Sidkoff, Pincus & Green, P.C. hereby responds to and opposes Defendants' Motion for Summary Judgment.

The grounds in opposition to the Motion are more fully set forth in the attached Memorandum of Law.

WHEREFORE, Plaintiff respectfully requests that Defendants' Motion for Summary Judgment be denied, and that the attached Order be entered of record.

Respectfully submitted,

/s/ Michael L. Block
LISA G. MILLER
MICHAEL L. BLOCK
Attorney I.D.
Nos. 54049/59387
Attorneys for Plaintiff

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street, 12th Floor
Philadelphia, PA 19106
(215) 574-0600

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY	:	**CIVIL ACTION**
v.	:	
DAVID S. OWENS, ET AL.	:	**NO. 86-4958**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

On April 28, 1987, Plaintiff Derrick Fontroy filed a *pro se* civil action pursuant to 42 U.S.C. §1983 alleging numerous infringements upon his constitutionally protected civil rights. David S. Owens, the only Defendant at that time, filed a Motion to Dismiss Plaintiff's Complaint, which ultimately was denied in part and granted in part. The Court's Order, a copy of which is attached hereto as Exhibit "A", gave the Plaintiff authority to proceed on two of the allegations contained in his original cause of action. Specifically, the Court ruled that the Complaint stated a cause of action for the following:

> (a) The Defendants acted with deliberate indifference to the safety of protective custody residents, through inadequate security procedures that subjected these residents to risk of harm from other inmates; and
>
> (b) The Defendants acted with deliberate indifference to the safety of inmates, through exposing inmates to asbestos that deprived them of minimal standards of habitable shelter.

The Court held that these allegations stated a claim under § 1983 for the violation of Plaintiff's Eighth Amendment rights.

On June 21, 1989, Plaintiff filed a Second Amended Complaint[1], which refined somewhat Plaintiff's two causes of action, and also named Irene Pernsly, Gaetiono Curione, and Harry Moore as Defendants. Specifically, the Second Amended Complaint alleged that while the Plaintiff was incarcerated in the D Rear section of Holmesburg Prison between November, 1984 and September, 1986, he suffered injuries to his mind and body as a result of inadequate security and that he was unreasonably and harmfully exposed to asbestos, a known carcinogenic. Significantly, rather than responding to the Second Amended Complaint with a Motion to Dismiss, on December 7, 1989, Defendants responded with an *Answer.* Now, as the trial of this matter approaches, Defendants have filed a Summary Judgment Motion which raises, for the first time, purely legal issues which should have been raised in a Motion to Dismiss.

During the course of this litigation, Plaintiff has repeatedly attempted to obtain discovery from Defendants, with limited success. Due to Defendants' failure to provide answers and responses to Plaintiff's two sets of written discovery, Plaintiff was forced to file a Motion to Compel on August 7, 1990. On August 9, 1990, Plaintiff's Motion was granted. Instead of fully complying with the Court's Order, however, Defendants provided written

---

[1] A First Amended Complaint was filed by Plaintiff, *pro se,* on June 8, 1987.

discovery from Defendant Owens only, claiming (for the first time) that the other Defendants had never been served with the Second Amended Complaint, and therefore could not be compelled to respond to discovery. After considering briefs and oral argument on the service issue, Magistrate Judge M. Faith Angell issued a Recommendation on December 21, 1990, finding that service had been accomplished as to these three Defendants. By Order dated January 9, 1991, this Recommendation was made an Order of the Court. Defendants Pernsly, Curione and Moore have yet to respond to Plaintiff's outstanding written discovery, and their counsel has yet to make them available for depositions, despite Plaintiff's counsel's repeated requests. See letters dated January 2, 1991 and January 23, 1991, attached hereto as Exhibit "B". Due to the obstructive tactics employed by Defendants, Plaintiff's discovery taking is far from complete.

More important for purposes of the instant motion, however, is that Defendants have submitted their motion with the benefit of absolutely *no discovery* of their own whatsoever. Defendants have yet to take Plaintiff's deposition, and until December 3, 1990, had not served Plaintiff with any written discovery. The lack of a developed factual record explains why the record is not cited in Defendants' Motion and why no sworn testimony is attached as a supporting exhibit. In fact, the only exhibits upon which Defendants purport to rely are three slip opinions, and an affidavit from the Deputy Superintendent of the Philadelphia County Prisons, which has been somewhat mysteriously included to verify that Plaintiff was housed in the Protective Custody Unit in D Rear, as alleged in the Second Amended Complaint.

Defendants' argument is thus an entirely legal one, and is supported by no facts. It is rather remarkable that Defendants are asking this Court to take the *extreme* step of awarding them summary judgment, when they have given the Court no factual basis to do so. As will be shown below, however, Defendants have not even come close to sustaining the heavy burden which they bear as summary judgment applicants, and the arguments raised in their motion (which is in essence a motion to dismiss) are barred by the law of the case.

II. LEGAL ARGUMENT.

A party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970). The party moving for summary judgment has the burden of identifying evidence which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Summary judgment is never warranted except on a clear showing that no genuine issue remains for trial and may not be granted where there is the slightest doubt as to the facts. *Tomalewski v. State Farm Life Ins. Co.*, 494 F.2d 882, 884 (3d Cir. 1974).

In deciding whether a genuine issue of material fact does exist, a court must consider all the evidence presented in the light most favorable to the non-moving party, giving him the benefit of all reasonable inferences arising from the facts. *Long v. New York Life Insurance Co.*, 721 F.2d 118, 119 (3d Cir. 1983); *Bank of America National*

Trust & Savings Assn. v. Hotel Rittenhouse Assoc., 595 F.Supp. 800, 802 (E.D. Pa. 1984); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972).

Defendants have failed to show that there is no genuine issue of material fact.

A. Defendants have not met their burden of proving that there is no material fact in Issue.

In *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972), the court stated that "where the evidentiary matter in support of a motion [for summary judgment] does not establish the absence of a genuine issue, summary judgment must be denied *even* if no opposing evidentiary matter is presented". This language could have been written specifically for this case. Not only have Defendants been recalcitrant in giving discovery, but they have taken none of their own. It seems to be Defendants' position that as long as they can stall Plaintiff in obtaining relevant discovery, while at the same time conducting none of their own, they will prevail on a motion for summary judgment based on an empty record, and by pointing out what Plaintiff has *not* "established." Defendants' burden, of course, is heavier than that.

Defendants have virtually no idea what Plaintiff would say were they to depose him, and they have no idea what his proof will be at trial. They do not know who his witnesses will be, what documents he will rely on, and they have not even had him submit to any medical testing to see whether he is suffering from any

harmful effects of asbestos exposure.[2] What Defendants do rely on to convince the court that there is no genuine issue of material fact here are legal arguments.

Defendants first argue that Plaintiff has failed to establish a case based upon deprivation of rights guaranteed by the Eighth and Fourteenth Amendments. Instead of relying on a factual record, Defendants base their hasty conclusions on a few legal decisions, including *Jones v. Owens*, No. 89-8977, Slip op. (E.D. Pa. Jan. 3, 1990), *Gonzalez v. Lyons*, No. 89-3711, Slip op. (E.D. Pa. June 15, 1989), and *Nester v. Meese*, No. 87-0794, Slip op. (M.D. Pa. Oct. 29, 1987).[3] Assuming that these cases hold that a civil rights plaintiff cannot prevail on a claim of mere exposure to asbestos, this case is distinguishable. Plaintiff here claims an injury; a claim which Defendants have not disproved.

Defendant next argues that Plaintiff has failed to establish the existence of asbestos in Holmesburg Prison.

---

[2] By Order dated 1/16/91, Magistrate Judge M. Faith Angell granted Plaintiff's Motion to Compel a chest x-ray.

[3] Defendants maintain these decisions collectively hold that an inmate's exposure to asbestos does not constitute a violation of the Eighth Amendment guarantee against cruel and unusual punishment. Contrary to Defendants' broad interpretation, Plaintiff asserts the cases stand for the narrow proposition that prisoner lawsuits based on the 8th Amendment will not be permitted when there is mere exposure to asbestos. Thus, there can be no judicial remedy for the enhanced risk of future harm from mere exposure, but a litigant could recover if the exposure results in the manifestation of physical injury.

However, according to Moore's Federal Practice, interpreting *Fed.R.Civ.P.* 56 at para 56.15[3] (2d Ed. 1988), pp. 56-249-253:

> . . . the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law.

Because Defendants have failed to disprove the presence of asbestos at the prison, there remains a material fact in issue. Until the Defendants, as the moving party, can provide factual data concerning the presence of asbestos, this Court has no basis to find that there is no genuine issue of material fact.

> The Defendant is estopped from again raising issues concerning the lack of specificity of the complaint through the doctrine of The Law of the Case.

B. The law of the case estops Defendants from raising issues concerning the lack of specificity of the Complaint.

The "law of the case" is a controlling principle, as established by a previous decision, between the same parties in the same case. More specifically, it means that once a rule or principle is established in a case, it continues to be the law of the case as long as the facts on which the decision was predicated continue to be the facts of the case. 21 C.J.S. Courts Sec. 195a. at p. 330.

In accordance with the foregoing rule, a decision or ruling on a question of pleading generally becomes binding as the law of the case. 21 C.J.S. Courts Sec. 195c. at 336, n.56 and 57 and cases cited therein. It is also a general rule that the law of the case as made by an interlocutory decision or order remains the law of the case except insofar as the facts are changed by evidence on the final hearing. *Id.* Although a ruling on a motion to dismiss or demurrer is not, as a rule, regarded as binding on the court in the subsequent course of the litigation, such a ruling may be regarded as the law of the case, as against another objection based on the same grounds as the demurrer. 21 C.J.S. Courts Sec. 195c. at p. 338 and n.67.

The doctrine of the law of the case has been defined as a " . . . rule of practice based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter". *Nedd v. Thomas,* 47 F.R.D. 551, 555 (M.D. Pa. 1969). One case which is instructive because it explains this doctrine in conjunction with a motion to dismiss is *Commercial Union of America v. Anglo - South American Bank,* 10 F.2d 937 (2d Cir. 1925). In *Commercial Union,* the court stated that where the trial judge denied a motion to dismiss the complaint, his decision was law of the case and should have been so treated by another judge hearing the case at a later stage; hence the later order of a different judge dismissing the complaint was improper. *Id.*

In *Michel v. Meier,* 8 F.R.D. 464, 469 (W.D. Pa. 1948), it was held that a defendant whose motion to dismiss the complaint for insufficiency was denied could not later move for summary judgment on the same ground. The

decision on the motion to dismiss was held to be the law of the case, and the defendant was estopped from raising the same question in a subsequent summary judgment motion. The situation before the Court is identical to the one in *Michel v. Meier*. Defendants already had their chance to argue that the complaint is deficient, and they were successful in paring Plaintiff's claims down to just two causes of action. The Court has ruled on Defendants' Motion to Dismiss and Defendants are not entitled to rehash these same issues by submitting a second Motion to Dismiss under the guise of a Motion for Summary Judgment.

In Defendants' Motion for Summary Judgment, they assert the following deficiencies in the Second Amended Complaint:

> (1) . . . Plaintiff sets forth a melange of allegations . . . offers no *specificity* as to the type of harm actually suffered by Plaintiff or indication of the time, date or frequency of occurrence of the harm. [emphasis added].
>
> (2) . . . Plaintiff suggests injury . . . without any *specificity* as to the type of injury or ailment suffered or the parts of the body affected. [emphasis added].
>
> (3) . . . judgment should be entered in favor of Defendant's because the *Complaint is devoid of any facts* . . . [emphasis added].
>
> (4) . . . Rather than setting forth the basis of the claim or the conduct complained with the *specificity* required in civil rights actions, . . . the complaint merely states in general terms . . . [emphasis added].

> (5) . . . *there is an absence of any facts to* support Plaintiff's allegation that his alleged exposure to asbestos caused him some measurable harm . . . [emphasis added].
>
> (6) . . . *unsupported are Plaintiff's allegations* that Plaintiff has "suffered" various injuries to his mind and body . . . [emphasis added].
>
> (7) . . . even if Plaintiff could establish a constitutional deprivation for exposure to asbestos, *Plaintiff's allegations are insufficient* to support a §1983 claim. [Emphasis added].

It is obvious that the Defendants' reliance on the alleged lack of specificity of Plaintiff's Second Amended Complaint is the foundation of the instant motion.

These are the same issues, however, which Defendants already raised in their Motion to Dismiss, where they argued that Plaintiff's "vague and conclusory allegations against the Defendant . . . fail to reach the required specificity to state a claim for which relief may be granted". See Defendants' Motion to Dismiss, paragraphs 7 and 9, attached hereto as Exhibit "C".

Defendants' Motion to Dismiss was granted in part by Order dated April 21, 1988. In the Order, the Court ruled that Plaintiff had stated a cause of action under the 8th Amendment through his allegations pertaining to inadequate security and exposure to asbestos. This earlier ruling is the law of the case, and it forecloses Defendants from raising these issues now. Accordingly, Defendants' attempt to re-litigate a Motion to Dismiss in the form of a Motion for Summary Judgment must fail.

III. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion for Summary Judgment be denied and that the attached Order be entered of record.

Respectfully submitted,

/s/ Michael L. Block
LISA G. MILLER
MICHAEL L. BLOCK
Attorney I.D. Nos. 54049/59387
Attorneys for Plaintiff

OF COUNSEL

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street
Philadelphia, PA 19106
(215) 574-0600

CERTIFICATION OF SERVICE

It is hereby certified that a true and correct copy of Plaintiff's Response to Defendants' Motion for Summary Judgment was delivered by United States First Class Mail, postage prepaid to the below named attorney of record:

Michael F. Coates, Esquire
Assistant City Solicitor
Law Dept./Claims Division
1101 Market Street, 9th Floor
Philadelphia, PA 19107-2996

DATED: January 23, 1991

/s/ Michael L. Block
MICHAEL L. BLOCK

PLAINTIFF'S EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FONTROY, et al.	:	CIVIL ACTION
v.	:	
	:	86-4958
OWENS, et al.	:	

ORDER

(Filed April 21, 1988)

AND NOW, this 20th day of April, 1988, upon consideration of defendant David S. Owens' motion to dismiss and plaintiffs' response thereto, it is hereby ORDERED that the motion is GRANTED in part and DENIED in part.

1. Plaintiffs' allegation of inadequate security procedures states a claim under the eighth amendment. Plaintiffs have alleged sufficient facts to support their claim that the defendant's deliberate indifference to the safety of protective custody residents has subjected them to a pervasive risk of harm from other inmates. *See Morgan v. District of Columbia*, 824 F.2d 1049, 1057 (D.C. Cir. 1987); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985).

A defendant acts with deliberate indifference when he disregards a substantial risk of danger that is either known to him or would be apparent to a reasonable person in his position. *See Benson v. Cody*, 761 F.2d 335, 339 (7th Cir. 1985). Prison administrators are under an obligation to take reasonable measures to guarantee the safety of inmates. *Hudson v. Palmer*, 468 U.S. 517, 526-27

(1984). In reviewing a motion to dismiss a section 1983 claim based on inadequate prison security measures, this Court's task is limited to the inquiry whether the complaint can fairly be construed as alleging a violation of the obligation sufficient to constitute a deprivation of protected rights. *See Colburn v. Upper Darby Township, et al.*, No. 86-1675, slip op. at 15 (3d Cir. Jan. 26, 1988).

2. Plaintiffs' allegation of asbestos problems in their cells states an eighth amendment claim. Dangerous exposure to asbestos caused by defendant's deliberate indifference could deprive inmates of the minimal civilized measure of life's necessities, i.e, habitable shelter. Such a deprivation could violate the eighth amendment. *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 998-99 (3d Cir. 1983).

3. Plaintiffs' claim of deprivation of access to the courts is DISMISSED. Plaintiffs fail to assert that the alleged restrictions in their use of the law library have resulted in actual deprivation of access. *See Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982).

4. Plaintiffs' claim of a first amendment violation based on prison practices affecting the opportunities of protective custody inmates to attend religious services is DISMISSED. Plaintiffs concede that they are permitted to attend one religious service per week on Sunday mornings. Plaintiffs' Complaint at 15 (Docket Entry No. 1). The gravamen of plaintiffs' claim is that they are not afforded the same opportunities to attend services and bible studies as are member of the general prison population. *Id.* Plaintiffs do not allege that the one service per week policy is not "reasonably related to legitimate penological

interests". *Turner v. Safely*, 107 S.Ct. 2254, 2261 (1987). Plaintiffs also allege that their one service per week is often denied due to a lack of escort officers and for other reasons. Allegations of negligence of the warden or other lower level prison employees in implementing this policy do not state a Section 1983 claim for violation of first amendment rights. *Compare Daniels v. Williams*, 106 S.Ct. 662, 666 (1986) (prison official's negligence causing unintended loss of or injury to prisoner's life, liberty or property does not implicate the Due Process Clause.

/s/ T. N. O'Neill
THOMAS N. O'NEILL, JR., J.

4/21/88
Illegible
D. Fontroy
C. S. Wells

PLAINTIFF'S EXHIBIT "B"

LAW OFFICES

Sidkoff, Pincus & Green

A PROFESSIONAL CORPORATION

TWELFTH FLOOR 530 WALNUT STREET

PHILADELPHIA, PA 19106

(215) 574-0600
TELEFAX 574-0310

January 2, 1991

****SENT VIA TELEFAX AND REGULAR MAIL****

Michael F. Coates, Esquire
Assistant City Solicitor
Law Dept./Claims Division
1101 Market Street, 9th Floor
Philadelphia, PA 19107-2996

RE: Fontroy v. Owens

Dear Mr. Coates:

This will confirm that you have agreed to grant us a two week extension of time within in which to provided [sic] answers and responses to your Interrogatories, Requests for Admissions, and Document Requests. Accordingly, our answers and responses, which had been due on January 3, will now be due on January 17, 1991.

We also discussed whether you will be opposing Judge Angell's Recommendation, in which she ruled that Pernsley, Moore and Curione are properly Defendants in the case. As you know, I would like to set up their depositions as soon as possible. You advised that you

would let me know by the end of the week whether you will be opposing the Recommendation or whether we can go ahead and set up the depositions.

Finally, you told me today that you had filed a Motion for Summary Judgment on December 28, 1990. I have not received a copy. Accordingly, you said that you will send out a copy today, and that my time to answer will run from the date of my receipt of your motion.

Very truly yours,

/s/ Lisa G. Miller
LISA G. MILLER

LGM:mfb

P.S. Since dictating this letter, I received a copy of your Motion in the mail. My brief in opposition will therefore be due on January 16, 1991.

LAW OFFICES
Sidkoff, Pincus & Green
A PROFESSIONAL CORPORATION
TWELFTH FLOOR 530 WALNUT STREET
PHILADELPHIA, PA 19106

(215) 574-0600
TELEFAX 574-0310

January 23, 1991

Michael F. Coates, Esquire
Assistant City Solicitor
Law Dept./Claims Division
1101 Market Street, 9th Floor
Philadelphia, PA 19107-2996

RE: Fontroy v. Owens, et al.
Civil Action No. 86-4958

Dear Mr. Coates:

I note that since my letter to you of January 2, 1991, I still have not been advised by you of dates when you will be available for the depositions of defendants Pernsley, Moore and Curione.

Please provide me with a list of your available dates for all three of these depositions by January 30, 1991, so that I may avoid scheduling them without your input.

Very truly yours,
LISA G. MILLER

LGM/oh

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PLAINTIFF'S EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY, *ET AL*	:	CIVIL ACTION
V.	:	NO. 86-4958
DAVID OWENS, *ET AL*	:	Twelve-Member Jury Trial Demanded

MOTION TO DISMISS COMPLAINT

(Filed June 2, 1987)

The defendant, David S. Owens, hereby moves this Honorable Court to dismiss the Complaint as to the moving defendant for the following reasons:

1. On April 28, 1987, plaintiff, Derrick Fontroy filed a pro se Complaint under 42 U.S.C.A. § 1983, against Superintendent of Prisons, David S. Owens. A copy of plaintiff's Complaint is attached and marked Exhibit "A".

2. On or about April 29, 1987, the defendant Owens was served with plaintiff's Complaint.

3. According to the allegations set forth in the Amended Complaint, Superintendent Owens has denied paying jobs, placed plaintiff at risk from from [sic] other inmates, deprived plaintiff of adequate telephone services, television viewing, educational opportunities, access to the courts, religious services and admission to the general reading library.

4. Plaintiff asserts that Superintendent Owens is legally responsible for the operation of Holmesburg Prison and for the welfare of all inmates at the prison.

5. On April 28, 1987, the Honorable Thomas O'Neill, Jr., dismissed as frivilous [sic] plaintiff's claims relating to employment, telephone access, television, educational and rehabilitation programs, access to the general library, *Jackson v. Hendrick*, and tobacco products.

6. The Complaint seeks compensatory and punitive damages as well as a declaratory judgment and preliminary and permanent injunctions.

7. However, vague and conclusory allegations against the defendant, Superintendent David S. Owens, fail to reach the required specificity to state a claim for which relief may be granted.

8. The Complaint is frivolous as to defendant Superintendent Owens, because plaintiff relies on the theory of respondeat superior for imposing liability, which theory is unavailable in 42 U.S.C.A. §1983 action.

9. Moreover, other than by vague and conclusory allegations, plaintiff has failed to assert an affirmative link between the defendant, Superintendent Owens, and the alleged accident.

10. Therefore, plaintiff has failed to state a claim upon which relief can be granted, as said claim relates to Superintendent Owens.

WHEREFORE, the defendant respectfully requests that this Honorable Court enter an Order in accordance with Federal Rule of Civil Procedure 12(b)(6), dismissing the Complaint in the instant action as to said defendant, with prejudice.

Respectfully submitted,

HANDSEL B. MINYARD
City Solicitor

NORMA S. WEAVER
Chief Deputy in Charge of Claims

DONNA J. MOUZAYAK
Divisional Deputy in Charge of General Trials

By: /s/ Frederick M. Walton
FREDERICK M. WALTON,
I.D. NO. 40755
Assistant City Solicitor
1101 Market Street, 9th Floor
Philadlephia [sic], PA
19107-2996
592-5224

Attorneys for City of Philadelphia

APPENDIX EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY	:	CIVIL ACTION
v.	:	NO. 86-4958
DAVID S. OWENS, et al	:	

ORDER

Filed May 2, 1991

AND NOW, this 1st day of May, 1991, upon consideration of defendants' motion for summary judgment and motion to determine the sufficiency of plaintiff's answers to defendant's request for admissions; of counsel for plaintiff's motion for leave to withdraw; of the supporting and opposing memoranda thereto; and of supplemental briefing on the applicability of the Eleventh Amendment, it is hereby ORDERED that:

1. Defendants' motion for summary judgment on plaintiff's claim arising out of plaintiff's alleged exposure to asbestos is GRANTED and judgment is entered against plaintiff and in favor of defendants.

Plaintiff Fontroy alleges that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by their deliberate indifference in exposing him to asbestos and danger from other inmates while incarcerated in the Protective Custody Unit at Holmesburg Prison for periods between 1984 and 1986. Plaintiff requests a declaratory judgment that the acts complained of are unconstitutional and seeks compensatory and punitive damages.

Pursuant to Fed.R.Civ.P. Rule 56(c), summary judgment should be granted

> if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. Rule 56(c).

In response to a properly supported motion for summary judgment, the nonmoving party may not rest on conclusory allegations in the pleadings, but must by affidavit or otherwise set forth specific facts sufficient to create a genuinely disputed material fact. *Fireman's Insurance Co. v. Du Fresne*, 676 F.2d 965, 969 (3d Cir. 1982).

Defendants argue that they are entitled to judgment in their favor because the possibility that plaintiff was exposed to asbestos, even if true, does not constitute cruel and unusual punishment. *See Jones v. Owens*, No. 89-8977, slip. op. at 3 n. 3 (E.D.Pa. Jan. 3, 1990) ("A prisoner's mere exposure to asbestos does not constitute a violation of the eighth amendment."); *Gonzalez v. Lyons*, No. 89-3711, slip. op. at 1 (E.D. Pa. June 16, 1989) ("It is well-settled that the kinds of conditions described by the plaintiff [including exposure to asbestos] however unpleasant they might be, do not amount to a violation of the Eighth Amendment."); *Nestor v. Meese et al.*, 1987 U.S. Dist. Lexis 10197 at 2 (M.D. Pa. October 29, 1987) ("While the use of asbestos may be unfortunate, the court cannot construe its existence alone as a claim of constitutional proportions.").

There is no evidence that plaintiff currently suffers symptoms of harmful exposure to asbestos. See Motion of Miller and the Law Firm of Sidkoff, Pincus & Green, P.C. for Leave to Withdraw their Appearance as Counsel for Plaintiff, Exh. A. ("Counsel's Motion"). The physician's report submitted to the court on recent front and lateral X-rays of plaintiff's chest reads, in part, "[t]he lungs are clear." *Id.* There is no mention of asbestos-related injury in the medical report.[1] *Id.*

Without evidence of injury related to exposure to asbestos, there is no genuine issue of material fact pertaining to plaintiff's asbestos claims. *See Jones v. Owens, supra; Gonzalez v. Lyons, supra; Nestor v. Meese, supra.* Plaintiff's assertions that genuine issues remain because defendants had not deposed or examined the plaintiff,[2] and have not disproved the presence of asbestos at the prison are moot in light of the absence of evidence that plaintiff suffers from any harmful effects of asbestos exposure. Memorandum in Opposition to Defendant's Motion for Summary Judgment at 5-6.

2. Plaintiff's claim related to inadequate prison security is DISMISSED.[3]

---

[1] Counsel for plaintiff represents that the additional notation in the medical report that "mild, old granulomatous disease" is present relates to the presence of nodules and is not a symptom of asbestos exposure. Counsel's Motion at 3, n. 3.

[2] The chest X-ray of plaintiff was performed on December 27, 1990, after defendants had filed their motion for summary judgment.

[3] By Order dated April 20, 1988, I denied defendants' motion to dismiss plaintiff's claim of inadequate security set

In their memorandum in support of their motion for summary judgment, defendants contend that the Second Amended Complaint is not specific and does not set forth facts sufficient to support plaintiff's claim that he was harmed as a result of inadequate security in the Protective Custody Unit at Holmesburg Prison. Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 5, 7, 8. Accordingly, I will treat this portion of defendants' motion as a motion to dismiss the complaint.

The Court of Appeals for the Third Circuit requires civil rights plaintiffs to allege in their complaints precisely what defendants have done to infringe upon their constitutional rights. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988) (quoting *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir. 1981)). In his Second Amended Complaint, plaintiff alleges:

> During the time when Plaintiff was incarcerated in the D Rear section of Holmesburg Prison, he was the victim of, witnessed, and learned of numerous crimes committed by the general population inmates against him and the other residents of D Rear, including beatings, stabbings, and other various forms of assaults, theft, threats and extortion.

Second Amended Complaint at ¶ 13. Plaintiff supplies no specific details of the crimes alleged and therefore has not complied with the pleading requirement applicable to

---

forth in an earlier Complaint and Amended Complaint filed by plaintiff. The earlier filings were on behalf of multiple unnamed plaintiffs. This Order concerns plaintiff's Second Amended Complaint, in which he is the sole plaintiff.

civil rights complaints. *Colburn*, 838 F.2d at 666 (to comply with specificity standard, complaint must "allege the specific conduct violating the plaintiff's rights, the time and place of that conduct, and the identity of the responsible officials").[4]

The Court of Appeals for the Third Circuit has cautioned district courts that "failure to permit amendment of a complaint dismissed for want of specific allegations constitutes an abuse of discretion." *Colburn*, 838 F.2d at 666 (quoting Ross, 638 F.2d at 650). In this case, however, plaintiff has been granted ample opportunity to amend his Complaint.

Plaintiff's original Complaint was filed and served in April, 1987 and in June of that year he filed an Amended Complaint. By Order dated April 21, 1988 and in response to plaintiff's motion for leave to amend the caption of the Complaint, I granted leave to file a Second Amended Complaint. In March, 1989, plaintiff moved for leave to file a "supplemental" complaint. By Orders dated November 2, 1988; May 10, 1989; and May 25, 1989, I granted or approved extensions of time for plaintiff to file the Second Amended Complaint, which he did on June 21, 1989. In sum, over the course of four years, plaintiff has never been denied the opportunity to amend his Complaint and has twice refined it and over that time I have entered four Orders granting plaintiff either permission or time to again amend his Complaint. In light of the special circumstances of this case, I believe I am within

---

[4] Defendants also move to dismiss plaintiff's damage claim for past and future mental anguish. In light of my disposition of plaintiff's claims, I need not reach this issue.

my discretion to deny plaintiff yet another opportunity to amend his Complaint.

3. Defendants' Motion to Determine the Sufficiency of Plaintiff Fontroy's Answers to Defendants' Requests for Admissions is DENIED as moot. As I have granted defendants' motion for summary judgment on plaintiff's asbestos claim and dismissed plaintiff's claim based on inadequate prison security, I need not determine the merits of defendants' motion.

4. Defendants argue in a brief supplemental to their summary judgment motion that plaintiff's claims for money damages against the prison officials are barred by the Eleventh Amendment to the Constitution. As I have disposed of both claims, this argument is moot. Moreover, the defendants in this case are not protected by Eleventh Amendment immunity because they are sued as officials of the City of Philadelphia, not as state officials, and the City cannot be considered the alter ego of the Commonwealth. *See Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247, 250-52 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970).

5. The motion of counsel for plaintiff for leave to withdraw their appearance is DENIED as moot, pending communication with plaintiff regarding a possible appeal of this Order.

Plaintiff's counsel, Lisa G. Miller, Esq., of Sidkoff, Pincus & Green, P.C., seeks to withdraw because plaintiff Fontroy's asbestos-related claim is unprovable and because plaintiff has refused to cooperate with counsel. Miller first filed her appearance on behalf of plaintiff Fontroy in April, 1988 and has competently represented

him for much of the time since then. Although plaintiff requested Miller to withdraw by letter dated February 1, 1991, *see* Counsel's Motion at ¶ 27 and Exh. L, plaintiff has since written to the court to oppose her motion.

Miller moves to withdraw pursuant to Pennsylvania Rules of Professional Conduct 1.16(b), which provides in part:

> Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> . . .
>
> (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
> (5) the representation . . . has been rendered unreasonably difficult by the client; or
> (6) other good cause for withdrawal exists.

Paragraph (c) provides:

> When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

In light of my disposition of plaintiff's asbestos-related claim, the first ground for counsel Miller's motion is moot. Miller represents that despite repeated requests, plaintiff Fontroy refused to contact her from September, 1990 to January, 1991; he did not tell her he had been transferred from a federal to a state prison; he ignored her requests that he answer written discovery and he has

often been sarcastic in his communications with her. Attorney Miller also complains that plaintiff has repeatedly acted as his own attorney by drafting and sending letters and pleadings to opposing counsel and to the court. As to this last claim, plaintiff Fontroy represents in his letter to the court opposing Miller's motion, that "I have not filed any petition since her last warning in September [1990]."

Pursuant to Pennsylvania Rules of Professional Conduct Rule 1.16(c), I instruct counsel to communicate with plaintiff Fontroy regarding a possible appeal of this Order and take whatever steps are necessary to permit plaintiff to appeal, should he wish to. Once counsel has informed the court of the outcome of her communication with plaintiff Fontroy, and has filed a notice of appeal if he so directs, upon letter application from Ms. Miller with a copy sent to plaintiff, I will enter an Order granting Counsel's Motion for Leave to Withdraw.

/s/ T. N. O'Neill, Jr.
THOMAS N. O'NEILL, JR. J.

5/2/91
Copy/P.P.
Coates
Miller

APPENDIX EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY	:	CIVIL ACTION
v.	:	NO. 86-4958
DAVID S. OWENS, et al	:	

ORDER

(Filed Aug. 19, 1991)

AND NOW, this 19 day of August, 1991, upon consideration of plaintiff's motion pursuant to Fed.R.Civ.P. Rule 59(e)[1] to amend the judgment and of the supporting and opposing memoranda, it is hereby ORDERED that said motion is GRANTED in part and DENIED in part.

1. To the extent that my Order dated May 1, 1991, granted defendants' motion for summary judgment on plaintiff's claim arising out of plaintiff's alleged exposure to asbestos, plaintiff's motion is GRANTED.

I granted defendants' motion for summary judgment in part based on the physician's report of recent front and lateral X-rays of plaintiff's chest, which read in relevant part, "[t]he lungs are clear" Plaintiff represents that this X-ray, taken on December 27, 1990, was not an examination for asbestos-related injuries but for dyspnea as is handwritten on the X-ray report. I find the existence of a genuine issue of material fact pertaining to plaintiff's

---

[1] Plaintiff moved also pursuant Fed.R.Civ.P. Rule 60(b). As plaintiff moved within the time limit for Rule 59(e), I consider his claims under that Rule.

asbestos-related claim as the report I relied on in my earlier Order apparently was not performed specifically to detect asbestos-related injury. *See Fireman's Insurance Co. v. Du Fresne*, 676 F.2d 965 (3d Cir. 1982). The portion of the Order granting defendants' motion for summary judgment is hereby VACATED pending a new medical examination of plaintiff.

2. By Order dated January 16, 1991, United States Magistrate Judge Angell ordered the Superintendent of the State Correctional Institute at Dallas, Pennsylvania to arrange for a chest X-ray of plaintiff.[2] Docket Entry No. 63. As this apparently has not yet been performed, the Superintendent should arrange for an X-ray examination of plaintiff within twenty (20) days. The results of the examination should be supplied to plaintiff's counsel.

3. Plaintiff's motion is GRANTED to the extent that my Order dated May 1, 1991 denied defendants' motion to determine the sufficiency of plaintiff's answers to defendants' requests for admissions and plaintiff's counsel's motion for leave to withdraw her appearance as moot. These portions of the Order are VACATED pending the new medical examination of plaintiff.

4. Plaintiff's motion is DENIED as to the remainder of the Order, by which I dismissed plaintiff's claim

---

[2] In their memorandum opposing plaintiff's motion, defendants represent that the court-ordered medical examination was negative, apparently in the belief that the December examination was performed pursuant to court order. Memorandum of Law in Support of Defendant's Response to Plaintiff's Motion toVacate Judgment at 3.

related to inadequate prison security and rejected defendants' Eleventh Amendment claims.

/s/ T. N. O'Neill
THOMAS N. O'NEILL, JR. J.

8-20-91
Copy/P.P.
Coates
Miller

APPENDIX EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DERRICK FONTROY	:	CIVIL ACTION
v.	:	NO. 86-4958
DAVID S. OWENS, et al	:	

ORDER

(Filed Nov. 20, 1991)

AND NOW, this 20th day of November, 1991, upon consideration of plaintiff's counsel's letter to the Court dated November 19, 1991, it is hereby ORDERED that the vacated portions of my Order dated May 1, 1991, are hereby REINSTATED. Plaintiff's Motion for Appointment of an Impartial Medical Expert Examiner and his Petition to Amend the Second Complaint are hereby DENIED.

1. By Order dated May 1, 1991, I granted defendants' motion for summary judgment on plaintiff's claim arising out of plaintiff's alleged exposure to asbestos. By Order dated August 19, 1991, I vacated the grant of summary judgment because the X- ray of plaintiff's chest on which my Order was based was not performed specifically to detect asbestos-related injury. I ordered an appropriate X-ray to be performed on plaintiff.

Plaintiff's counsel, Lisa G. Miller, has attached the report of the second examination to her letter dated November 19, 1991. The report, attached to this Order, concludes that "the lungs are clear," plaintiff's chest is "normal" and that "[p]articular attention to the parenchyma and pleura for asbestiosis failed to reveal any

significant evidence of this process." As these results are consistent with the negative Xray report on which I based my earlier grant of defendants' motion for summary judgment, I reinstate that portion of my Order dated May 1, 1991. Judgment is ENTERED in favor of defendants and against plaintiff on plaintiff's asbestos-related claim.

2. I hereby REINSTATE that portion of my Order dated May 1, 1991 which denied as moot defendants' motion to determine the sufficiency of plaintiff's answers to defendants' requests for admissions.

3. I hereby REINSTATE the portion of my Order dated May 1, 1991 which denied as moot plaintiff's counsel's motion for leave to withdraw her appearance, pending communication with plaintiff regarding a possible appeal of this Order.

Pursuant to Pennsylvania Rules of Professional Conduct Rule 1.16(c), I instruct counsel to communicate with plaintiff Fontroy regarding a possible appeal of this Order and take whatever steps are necessary to permit plaintiff to appeal, should he wish to. Once counsel has informed the Court of the outcome of her communication with plaintiff Fontroy and has filed a notice of appeal if he so directs, upon letter application from Ms. Miller with a copy sent to plaintiff, I will enter an Order granting Counsel's Motion for Leave to Withdraw.

4. Plaintiff's Motion for Appointment of an Impartial Medical Expert is DENIED as moot.

5. Plaintiff's Petition to Amend the Second Complaint is DENIED for the reasons set forth in my Order dated May 1, 1991, paragraph 2.

/s/ T. N. O'Neill
THOMSA N. O'NEILL, JR. J.

11-21-91
Copy/P.P.
Coates

APPENDIX EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Derrick Dale Fontroy, I et al.	:	CIVIL ACTION
v.	:	NO. 86-4958
David S. Owens, et al	:	

NOTICE OF APPEAL

(Filed Dec. 19, 1991)

Notice is hereby given that Derrick Dale-Fontroy, I., plaintiff in the above-entitled matter, appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on November 20, 1991.

Date 12-16- 1991

/s/ Derrick Dale Fontroy, I.
Derrick Dale Fontroy, I.
Drawer K-Y-7513
Dallas, Pa 18612-0286

APPENDIX EXHIBIT 14

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-2070

DERRICK DALE FONTROY,

Appellant

v.

DAVID OWENS, IRENE PERNSLEY,
GAETANO CURIONE, HARRY MOORE

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-4958)
District Judge: Hon. Thomas N. O,Neill, Jr.

Submitted Under Third Circuit Rule 12(6)
February 22, 1993

Before: SLOVITER, *Chief Judge*, MANSMANN
and SCIRICA, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

/s/ Sloviter
Chief Judge

Attest:

/s/ P. Douglas Sisk,
P. Dougals Sisk, Clerk
Dated: FEB 25 1993

FILED
NOV 26 1993
OFFICE OF THE CLERK

No. 93-281

In The Supreme Court of the United States

October Term, 1993

Derrick Dale Fontroy,
Petitioner

V.

David S. Owens,
Irene J. Pernsley,
Gaetano Curione,
and Harry Moore,
Respondents

BRIEF OF RESPONDENTS OWENS, PERNSLEY, CURIONE AND MOORE, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Michael F. Eichert
Divisional Deputy City Solicitor
Counsel of Record

Marie C. Lasota
Assistant City Solicitor

Attorneys for Respondents

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No. 93-281

In The Supreme Court of the United States

October Term, 1993

Derrick Dale Fontroy,
Petitioner

V.

David S. Owens,
Irene J. Pernsley,
Gaetano Curione,
and Harry Moore
Respondents

BRIEF OF RESPONDENTS OWENS, PERNSLEY, CURIONE AND MOORE, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER-STATEMENT OF THE CASE

Whatever clarification of Petitioner's Statement of the Case is necessary appears in the Respondents' argument below. We note only that the Petitioner's complaints of inadequate discovery (Petitioner for Certiorari at p. 9 n. 12) were brought to the trial court's attention, giving Petitioner the full opportunity to compel any necessary discovery.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE QUESTION WHETHER PETITIONER HAS STATED A CAUSE OF ACTION FOR INVOLUNTARY EXPOSURE TO ASBESTOS.

A. The Question Of Whether Involuntary Exposure Of A Prisoner To Asbestos States An Eighth Amendment Claim Absent Present Injury Is Not Properly Presented For Review Before This Court.

Petitioner asks this Court to decide whether an inmate's involuntary exposure to asbestos while in prison is actionable under the Eighth Amendment even though he has not sustained any present injury from the exposure. This question is not properly presented for review before this Court.

The basic rule is that in cases originating in the federal courts, certiorari will not be granted where an issue is neither "pressed or passed upon" in the courts below, except in "exceptional cases." *Duignan v. United States*, 274 U.S. 195, 200 (1927). See also, *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977). Although the rule is prudential rather than jurisdictional in cases arising from federal courts, *Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980), there are no exceptional circumstances to justify granting certiorari in this case.[1] *U.S. v. Williams*, 112 S.Ct. 1735 (1992), recently held that "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon ..." 112 S.Ct. at 1738-1739. But the question which Petitioner Fontroy now urges this Court to review was neither

---

1. In cases involving certiorari to state courts, the rule may be jurisdictional because of federalism concerns, although the question does not appear to be settled. *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153, 169 (1992). See also, *Illinois v. Gates*, 462 U.S. 213, 221-222, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

presented to nor passed upon by the District Court, and was certainly not passed upon by the Court of Appeals.

There is no claim for exposure to asbestos in the body of Petitioner's original *pro se* Complaint. Attached to the Complaint, however, was an exhibit entitled "Stipulation and Agreement" (A-24 through A-39), which contains the following sentence:

> Even worse is the fact, we are completely surrounded by ASBESTOS. Under the law this was to be removed sometime ago, as it is a known CANCER causing agent.

(A-37.) (emphasis in original)

This was the only statement anywhere in the initial pleading which mentioned asbestos, and Petitioner concedes that this so-called "Stipulation and Agreement" was not a stipulation at all, but merely a statement by the Plaintiffs. (Petition for Certiorari, p. 3 n. 4.)

In its ruling under 28 U.S.C. §1915(d), the District Court on April 28, 1987 dismissed some claims and allowed the Plaintiffs to proceed with their remaining claims including, inter alia, the claims concerning cell conditions.[2] (A-47, 48.) This arguably included the asbestos exposure claim.

The Complaint was served on Defendants, who moved to dismiss under Fed. R. Civ. P. 12(b)(6). On June 9, 1987, prior to any decision on the Motion to Dismiss, Fontroy filed an Amended Complaint which entirely omitted all mention of asbestos, (A-51-55.)

On April 21, 1988, the District Court granted in part and denied in part the Motion to Dismiss. (A-62-64.) With respect to the asbestos claim, the Court wrote:

---

2. The original Complaint seems to have included other unnamed plaintiffs as well as Fontroy.

> "2. Plaintiffs' allegation of asbestos problems in their cells states an eighth amendment claim. Dangerous exposure to asbestos caused by defendant's deliberate indifference could deprive inmates of the minimal civilized measure of life's necessities, i.e., habitable shelter. Such a deprivation could violate the eighth amendment"

(A-63.)

As written, this ruling seems not to depend on any allegation of present harm, and so arguably could be said to have decided in Fontroy's favor the exact question which he now asks this Court to review: whether involuntary exposure of a prisoner to asbestos states a cause of action even without evidence of present harm.

But thereafter, Fontroy never again presented or argued this issue to the District Court. After securing counsel, Petitioner filed a Second Amended Complaint, in which he was the only plaintiff, and changed his asbestos exposure claim to specifically include an allegation of present harm caused by the exposure. (A-69, Paragraph 16, Second Amended Complaint.) Even more importantly, in his Response to Defendants' Motion for Summary Judgment, Fontroy did not argue that he had a cause of action for involuntary exposure despite the absence of present harm. On the contrary, his entire defense to the Summary Judgment Motion was an attempt to show that he was physically injured. Fontroy's Memorandum of Law in Opposition to Summary Judgment is direct and explicit on this point. After citing several cases which held that asbestos exposure was not *per se* actionable,[3] Petitioner states:

> Assuming that these cases hold that a civil rights plaintiff cannot prevail on a claim of mere exposure

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3. *Jones v. Owens*, 1990 WL 121193 (E.D. Pa.), *Gonzalez v. Lyons*, 1989 WL 66386 (E.D. Pa.), *Nester v. Meese*, (M.D. Pa. October 29, 1987).

> to asbestos, this case is distinguishable. Plaintiff here claims an injury; a claim which Defendants have not disproved.

(A-117.)

Furthermore, in Footnote 3 of his Memorandum of Law, Fontroy expressly adopts the exact statement of the law which he now argues is incorrect:

> "Contrary to Defendants' broad interpretation, Plaintiff asserts that these cases [*Jones*, *Gonzalez* and *Nester*] stand for the narrow proposition that prisoner lawsuits based on the 8th Amendment will not be permitted when there is mere exposure to asbestos. Thus there can be no judicial remedy for the enhanced risk of future harm from mere exposure, but a litigant could recover if the exposure results in the manifestation of physical injury."

(A-117.)

Plaintiff Fontroy nowhere argued before the District Court that the cases cited by Defendants (*Jones*, *Gonzalez* and *Nester*) were not the law, or that a different legal principle should apply. Instead, Fontroy completely abandoned the claim which he arguably made in his original Complaint that exposure was *per se* actionable, and opposed summary judgment solely on the ground that he had symptoms of physical injury. He sought to present evidence of present injury, and the District Court allowed him the opportunity to do so. Indeed, because there was some uncertainty about the results of the diagnostic testing, the Court vacated the relevant portion of its May 2, 1991 Order to allow additional X-rays of Fontroy's lungs. (A-141 through A-143.) The X-rays were all negative, and summary judgment was entered for the Defendants.

It is therefore clear that the issue which Petitioner now seeks to present before this Court was not pressed upon the District Court, nor was it the basis of that Court's decision.

The District Court entered summary judgment against Petitioner on the basis of the legal theory presented by both parties and the evidence which counsel for Fontroy admitted was critical under that theory, i.e., symptoms of present injury. Petitioner's original Complaint may have claimed that mere exposure is actionable. But Fontroy twice amended his Complaint, changed his theory of the case, and never again argued to the District Court the *per se* actionability of asbestos exposure.

On appeal to the Third Circuit, Petitioner sought to present the question which he now asks this Court to review. See, Appellant's Brief to the U.S. Court of Appeals for the Third Circuit, p. 1. The Court of Appeals affirmed the District Court in a Judgment Order without any opinion. Third Circuit Internal Operating Procedures, Rule 6.1. It is therefore impossible to say that the Court of Appeals considered or decided the question presented here for review. The affirmance might well have been based on the conclusion that Fontroy waived or abandoned the issue in the District Court, which would have constituted an entirely proper basis for affirmance. *Brenner v. Local 514, United Brotherhood of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991). In any event, absent an opinion from the Court of Appeals, this Court should not deviate from the usual rule that certiorari will not be granted where an issue is neither "pressed or passed upon" in the courts below.

Finally, it cannot be argued that this Court's decision in *Helling v. McKinney*, ___ U.S. ___, 113 S.Ct. 2475 (1993) changed the law so that Petitioner should be allowed to resurrect his claim that a cause of action exists despite the absence of present physical injury. In his Petition for Certiorari (pp 16-17) Petitioner argues that *Webster v. Sowders*, 846 F.2d 1032 (6th Cir. 1988), *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990) and *Rice v. North Carolina Dept. of Corrections*, 873 F.2d 1440 (table; text in Westlaw) (4th Cir. 1989) had allowed Eighth Amendment asbestos exposure claims to proceed despite the absence of present injury. All of these decisions

were reported before Fontroy's Response to Defendants' Motion for Summary Judgment, and could certainly have been argued at that time. (Indeed, *Webster* was decided before Petitioner's Second Amended Complaint was filed). The cases which hold that mere exposure is not actionable are from other District Courts and were not binding upon the trial court. *Jones v. Owens*, 1990 WL 121193 (E.D. Pa.), *Gonzalez v. Lyons*, 1989 WL 66386 (E.D. Pa.), *Nester v. Meese*, (M.D. Pa. October 29, 1987). Petitioner had full and fair opportunity to argue that no proof of present injury was required to state a claim, and he deliberately chose not to press this argument. He made a tactical decision to stake his claim on evidence of present injury, and failed in his proof. The District Court and the Court of Appeals correctly decided the claim which Fontroy presented to them.

B. The Court Of Appeals Decision Was Entirely Correct And Does Not Conflict With *Helling v. McKinney*, 113 S.Ct. 2475 (1993), Or With The Decisions Of Other Circuits.

Because the Court of Appeals wrote no opinion, it is impossible to know the reason why it affirmed the District Court. It is therefore complete speculation for Petitioner to assert that the Third Circuit's decision conflicts with *Helling v. McKinney*, 113 S.Ct. 2475 (1993), or with decisions of other circuits on the actionability of asbestos exposure claims under the Eighth Amendment. There are clear grounds for affirmance which in no way conflict with existing case law.

One such ground is waiver. As argued above, in the District Court Petitioner abandoned his argument that proof of present injury is unnecessary to state a claim. He did not, as he could have, argue in the alternative that evidence of present injury was unnecessary but nonetheless was present in his case. Instead, he expressly assumed, in his Memorandum of Law Opposing Summary Judgment, that the law required proof of present harm, and then tried to develop evidence of such harm. (A-117) It bears repeating that at this point

Fontroy was represented by counsel. The Third Circuit could easily have affirmed on the basis that he waived his argument that exposure to asbestos was *per se* actionable. Affirmance based on waiver obviously would not conflict with *Helling*, *Webster*, *Rice* or *Powell*.

There is a second sound reason for the Court of Appeals' affirmance of the District Court's judgment. In answering Defendants' Motion for Summary Judgment, Fontroy failed to provide any evidence that he was exposed to asbestos while in the Philadelphia prisons. The allegation of exposure was denied in Defendants' Answer to Plaintiff's Second Amended Complaint. Lack of exposure was specifically raised as one of the grounds for Summary Judgment. (A-90.) Plaintiff would clearly have had the burden of proving exposure at trial, and therefore had the burden of demonstrating that a genuine issue of fact existed on this point. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Third Circuit might well have affirmed because of Fontroy's utter failure, after four and one half years of litigation, to come forward with even a scintilla of evidence of exposure to asbestos. Fontroy produced no depositions, admissions, answers to interrogatories or affidavits stating that he was in fact exposed to asbestos, but instead relied on the allegations of his Second Amended Complaint. On this ground alone summary judgment for Defendants was proper.

II. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE COURT OF APPEALS JUDGMENT WITH RESPECT TO PETITIONER'S EQUAL PROTECTION CLAIM.

Petitioner's equal protection claim is based on alleged differences in treatment between protective custody inmates and general population inmates with respect to various goods and services available in prison. Despite his disclaimer (Petition for Certiorari, pp. 18-19), Fontroy's argument amounts to the claim that protective custody inmates are entitled to re-

ceive identical treatment with respect to each of these items. The argument is incorrect as a matter of law, and is refuted by the very allegations of Fontroy's own pleading. Accordingly, the decisions of the courts below were entire correct.

Petitioner's original Complaint admitted that:

> P.C. [protective custody] inmates are in protective custody because they fear for their lives and/or personal safety or because they can't get along with their fellow inmates in general [sic] population or for all the aforementioned reasons.

(A-25.)

The Complaint itself admits that protective custody inmates are security risks. They are likely to be either aggressors or victims, and cannot be allowed to mix freely with the general population. The demand for absolute equality of treatment would eliminate the discretion given to prison authorities to control matters of prison administration, including conditions of confinement. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Turner v. Safley*, 482 U.S. 78 (1987). *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986), cited by Petitioner, plainly states that differences in treatment must be substantial before an equal protection violation is found.

Despite counsel's attempt to dress up the equal protection claim on appeal, Fontroy's pleadings show this claim to be plainly frivolous, which is exactly what the District Court found. For example, with respect to jobs within the prison, Fontroy's Complaint, while admitting that jobs are actually available for protective custody inmates, consists of suggestions about when and where these inmates should be allowed to work, and what their compensation should be. (A-26.) The allegations concerning education do not come close to alleging substantial differences in treatment. They are just a "wish list" of three educational programs in which Fontroy would like to participate. There is no allegation that equivalent substitutes are unavailable. (A-31-32, A-54.) The allegations concerning telephone, television, tobacco and religious services

all fail to set forth constitutionally cognizable differences in treatment. The differences which do exist are so minor as to plainly be within the discretion of prison authorities to impose.

Petitioner states: "The District Court should have evaluated and compared the differences in treatment between protective custody and general population inmates." (Petition for Certiorari, p. 23) The Court's evaluation was thorough, and took into consideration the discretion of prison authorities, the insubstantial nature of most of Fontroy's claims, the legitimate penological differences between the two population groups and the nature of the different treatment accorded them. The resulting decision was entirely correct.

III. CERTIORARI SHOULD NOT BE GRANTED WITH RESPECT TO THE JUDGMENT OF THE LOWER COURTS ON THE INADEQUATE SECURITY CLAIM.

A. In Ruling On Respondents' Motion For Summary Judgment, The District Court Was Not Bound By The Doctrine Of Law Of The Case, And Was Free To Reexamine Its Earlier Decision On The Inadequate Security Claim.

Petitioner does not directly challenge the correctness of the District Court's decision that the Second Amended Complaint did not state a claim for inadequate security. That precise issue forms no part of the Petition for Certiorari. Instead, what is presented is the narrow question of whether in the procedural posture of this case the District Court was free to reexamine its previous denial of the relevant part of Respondents' Motion to Dismiss. Petitioner asserts that the trial court was bound by the doctrine of law of the case when it decided the claim of inadequate security in the context of the Motion for Summary Judgment.

The term "law of the case" encompasses four different areas of procedural practice in the lower courts. Those four areas are: (1) where a lower court adheres to its own prior

ruling in the same case; (2) where a lower court is bound by the decisions and rulings of a higher court within a single judicial system; (3) where one judge defers to the rulings of another judge of the same court in the same case; and (4) where a party fails to appeal an issue or preserve it for review. Wright, Miller and Cooper, Federal Practice and Procedure, Vol. 18, Jurisdiction, Ch. 13 §4478 at p. 788. The version of law of the case applicable in the present situation is that stated in (1), above, where a lower court adheres to its own prior ruling in the same case. However, when this version of law of the case applies to a given situation, it is only a rule of practice, not absolutely final and binding on the court.

As Wright, Miller and Cooper state: "Although courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish." *Id.* In *Messenger v. Anderson*, 225 U.S. 436 (1912), this court stated that "In the absence of statute, the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Id.* at 444 (citations omitted). Grounds that may justify reexamination of a decision include intervening change of controlling law, availability of new evidence, or the need to correct clear error or to prevent manifest injustice. Wright, Miller & Cooper, Federal Practice and Procedure, Vol. 18, Jurisdiction, Ch. 13 §4478 at p. 790. Moreover, Fed. R. Civ. P. 54(b) expressly acknowledges and permits a trial court to reconsider an earlier decision:

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties**
>
> . . .
>
> In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to

> any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(emphasis added).

The cases which Petitioner cites in support of his argument invariably note that law of the case is a discretionary doctrine, and not a limit to the tribunal's power. *Arizona v. California*, 469 U.S. 605, 618 (1983); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988), citing *Messenger*, 225 U.S. at 1156; *New York State National Organization for Women v. Terry*, 961 F.2d 390, 395-396 (1992); *Redfield v. Continental Gas Co.*, 818 F.2d 596, 605 (7th Cir. 1987); *Little Earth of the United Tribes v. United States Department of Housing and Urban Development*, 807 F.2d 1443, 1440 (8th Cir. 1986).

Moreover, most cases cited by Petitioner do not involve the particular application of law of the case which the District Court allegedly "violated" here. *Christianson v. Colt Industrial Operating Corp.*, 486 U.S. 800, 817 (1988) (Court of Appeals for the Seventh Court revisited issue already examined in case transferred from Court of Appeals for the Federal Circuit); *Redfield v. Continental Gas Co.*, 818 F.2d 596 (7th Cir. 1987) (Question whether prior state court ruling in same case was binding on Federal Bankruptcy Court); *Little Earth of the United Tribes v. United States Department of Housing and Urban Development*, 807 F.2d 1443, 1440 (8th Cir. 1986) (After passage of two years time, Appellant sought reconsideration in Court of Appeals of issue decided in District Court, but from which no appeal was taken); *A. & A. Concrete v. White Mountain Tribe*, 781 F.2d 1411 (9th Cir. 1986) (Court held inapposite Appellants' attempt to apply as law of the case District Court's decision from a previous unrelated case); *Gage v. General Motors*, 796 F.2d 345 (10th Cir. 1986) (Federal court reviewed issues previously determined by state court tribunal); *Commercial Union of America v. Anglo-South Amer-*

ican Bank, 10 F.2d 937 (1925) ("Judges of coordinate jurisdiction sitting in the same court and the same case, should not overrule the decisions of each other" *Id.*, at 941.)

The case of *Wyoming v. Oklahoma*, 502 U.S. ___, 112 S.Ct. 789, 117 L.Ed. 2d 1 (1992) actually supports Respondents' position here, that the District Court was free to reexamine its earlier decision. In *Wyoming*, a case brought under the original jurisdiction of this Court, Defendant State of Oklahoma took exception to a Special Master's recommendation that Plaintiff had standing to sue. The Court refused to accept Defendant's position, and noted that it had twice rejected the argument earlier in the litigation. But the Court expressly stated that its decision was based on the lack of merit of Defendant's argument, not on any absolute bar to reconsideration of the earlier decisions:

> "In each brief submitted on the issue, Oklahoma has recited the same facts, cited the same cases, and constructed the same arguments. Of course, we surely have the power to accede to Oklahoma's request at this late date, and if convinced, which we are not, that we were clearly wrong in accepting jurisdiction of this case, we would not hesitate to depart from our prior rulings."

Id., 117 L.Ed. 2d at 17 (emphasis added).

Under Rule 54(b) as well as under the doctrine of law of the case, the District court here was free to reexamine its earlier decision regarding whether Fontroy stated a claim for inadequate security.

B. Fontroy's Second Amended Complaint Was Not A "New" Complaint, And He Was Put On Notice That The Inadequate Security Claim was Deficient When The Defendants Filed Their Motion For Summary Judgment. Petitioner Was Not Entitled To Any Further Leave To Amend.

Contrary to Petitioner's assertion, the District Court did not consider Fontroy's Second Amended Complaint as a "new" Complaint. (Petition for Certiorari p. 27). That is a fiction created by Petitioner. The District Court acknowledged that it had earlier denied Defendants' motion to dismiss the inadequate security claim asserted in Fontroy's Original and Amended Complaints. The Court also noted that "The earlier filings were on behalf of multiple unnamed plaintiffs. This order concerns plaintiff's second amended complaint, in which he is the sole plaintiff." (A-135-136; May 2, 1991 Order of O'Neill, J., n. 3). In point of fact, Fontroy's Second Amended Complaint was his third attempt to set out his claims. He had ample opportunity to amend his Complaint, and did so on several occasions. For these reasons, all of the cases cited by Petitioner to show that leave to amend should be liberally granted are irrelevant and inapplicable.

Furthermore, the District Court's decision to reexamine Fontroy's inadequate security claim was made after the Defendants had moved for Summary Judgment, and after Fontroy had responded to that motion. Defendants' motion stated: "Also fatal to plaintiff's claims are the absence of any facts in the Complaint or in discovery to suport [sic] the allegations that plaintiff actually suffered some measurable harm (physical and/or mental) as a result of inadequate security in the PCU." (A-91, memorandum of Law in Support of Defendants' Motion for Summary Judgment).

Under this Court's holdings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), once Defendants moved for Summary Judgment,

Fontroy was required to "make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex*, 477 U.S. at 322. In the filing of Defendants' Motion for Summary Judgment, Fontroy was alerted to the deficiencies in his inadequate security claim. Fontroy failed to meet his burden under a Summary Judgment standard.

Petitioner never argued before the District Court, or before the Court of Appeals, that the allegations in the Second Amended Complaint were sufficient to state a claim. After four years of discovery, Fontroy never pointed to or presented any evidence that might establish his inadequate security claim. There were no probative exhibits or affidavits attached to the Response, and the Response designated no part of the record which might indicate culpability on the part of the Defendants. Petitioner merely asserted, incorrectly, as he does here, that the court was bound by the law of the case doctrine in deciding the inadequate security claim.

Petitioner misleads this court by repeatedly stating that the District Court twice upheld his inadequate security claim. (Petition for Certiorari, p. i, 24-25.) In making this claim, Petitioner construes the District Court's initial decision not to dismiss the inadequate security claim under 28 U.S.C. §1915(d) as the equivalent of a denial of a Rule 12(b)(6) motion. This is not correct. *See Neitzke v. Williams*, 490 U.S. 319, at 327-328 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law." (citations omitted). 28 U.S.C. §1915(d) "accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless.")

Contrary to Petitioner's assertions, there was nothing unfair about the District Court's dismissal of the inadequate security claim. Defendants' Summary Judgment Motion effectively put Fontroy on notice that his claim was defective

because there was no evidence to support it. Fontroy responded with no evidentiary support for his claim. He neither argued that the claim for inadequate security stated a claim, nor supported that claim sufficiently to defeat the Motion for Summary Judgment, nor sought the opportunity to amend the complaint. In such a situation, the District Court clearly had the power to reexamine the inadequate security claim.

CONCLUSION

For all of the above reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari which has been filed in this case.

Respectfully submitted,

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